No. 011099 JAN 22 2002

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In The

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties, HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION, MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK BARRETT OK #557
Counsel of Record
P.O. Box 896
Norman, OK 73070
(405) 364-8367

CHERYL A. PILATE MO #42266
WYRSCH HOBBS & MIRAKIAN, P.C.
1101 Walnut, Suite 1300
Kansas City, MO 64106
(816) 221-0080 Telephone
(816) 221-3280 Facsimile

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that it lacks specificity when this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), suggests a district court faced with such a situation should either require a reply or a more definite statement, and, further whether such action by the district court violates the Due Process Clause of the Fifth Amendment, which guarantees notice and an opportunity to be heard? Divergent circuit views on whether *Crawford-El* permits or precludes a heightened pleading standard in civil rights cases involving individual defendants make this issue ripe for this Court's consideration.

2. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground it lacks specificity without granting Plaintiff an opportunity to amend.

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The decision of the United States Court of Appeals of which Petitioner seeks review is reported as *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). The opinion also appears in the Appendix to this Petition at App. 1a. The decision of the district court is not reported and appears at App. 11a. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. Aug. 21, 2000). The district court adopted the Report and Recommendation of the Magistrate Judge, issued two months earlier. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. June 20, 2000). App. 14a.

STATEMENT OF JURISDICTION

Plaintiff Michael Erikson filed the present lawsuit under 42 U.S.C. § 1983, a federal civil rights statute. Jurisdiction was conferred by section 1983 and by 28 U.S.C. §§ 1331 and 1332. Mr. Erikson appealed the dismissal of his suit to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed the dismissal by an Opinion issued August 23, 2001. *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). Mr. Erikson did not file a Petition for Rehearing. Mr. Erikson then sought review by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254 and Supreme Court Rules 12 and 13.

He timely files the Petition pursuant to an extension of time granted by this Court on November 13, 2001.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The **Fourth Amendment** of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The **Fifth Amendment** of the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V (emphasis added).

Section 1983 of Title 42 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12(b)(6) states as follows:

> **(b). How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Mr. Erikson seeks review of a decision of the United States Court of Appeals for the Tenth Circuit in which the court affirmed the dismissal of his civil rights case, brought under 42 U.S.C. § 1983. *Erikson v. Pawnee County*

Board of County Commissioners, 263 F.3d 1151 (10th Cir. 2001). Jurisdiction was conferred by 28 U.S.C. §§ 1331, 1332, and 1291.

Nature of the Case

Michael Erikson was twice prosecuted, unsuccessfully, for his actions in shooting and killing Tony McCollum and Fred Head on his family's ranch property. *Erikson*, 263 F.3d at 1153. Substantial facts pointed to self defense, but the Pawnee County, Oklahoma, prosecutor nonetheless charged Erikson with murder. *Erikson*, 263 F.3d at 1153; App. at 1a. The jury acquitted Erikson of murder and all lesser included offenses in the death of Head. *Erikson*, 263 F.3d at 1153. The jury could not reach a unanimous verdict with regard to McCollum, and the prosecutor then retried Erikson on the charge of voluntary manslaughter. At the second trial, the jury again failed to reach a unanimous verdict on the manslaughter charge, and another mistrial was declared. *Erikson*, 263 F.3d at 1153. Prosecutors later dismissed, without prejudice, the third prosecution, which also charged voluntary manslaughter in the death of McCollum. *Erikson*, 263 F.3d at 1153.

Mr. Erikson then filed suit against the Pawnee County Board of County Commissioners, the District Attorney, and four private defendants under 42 U.S.C. § 1983, alleging that they violated his federal civil rights by conspiring to prosecute him for the deaths of Head and McCollum even though the evidence was not sufficient and did not support probable cause. *Erikson*, 263 F.3d at 1153. Erikson further alleged that the four private

defendants (two individuals, a law firm and the Oklahoma Sportsman's Association) directly participated in and influenced the prosecution. The actions of the private defendants, according to the allegations, included contributing funds to a law firm, which then in turn provided "research assistants and investigators" to the prosecution, to assist in the Erikson case. App. at 29a-30a.

The Tenth Circuit Decision

On August 23, 2001, the United States Court of Appeals for the Tenth Circuit issued a decision, without oral argument, affirming the dismissal by the district court of Michael Erikson's federal civil rights complaint under Federal Rule of Civil Procedure 12(b)(6). *Erikson*, 263 F.3d at 1153. The Tenth Circuit stated that it agreed with the findings of the magistrate judge concerning Eleventh Amendment and immunity issues, but did not specifically address those issues. 263 F.3d at 1153-54. The Tenth Circuit instead articulated two additional grounds supporting its decision affirming the dismissal: (1) Erikson did not plead sufficient facts alleging that one of the private defendants, Michael Turpen, "exercised control" over the prosecution; and (2) Erikson did not plead sufficient facts to support a Fourth Amendment claim for malicious prosecution. *Erikson*, 263 F.3d at 1154.

Regarding the first ground, the Tenth Circuit acknowledged that Erikson alleged that Turpen, acting on behalf of the Oklahoma Sportsman's Association (OSA), provided research assistants and investigators to assist the prosecutor, Larry Stuart. The appellate court held that this allegation was not sufficient because it did not state

that Turpen "exercised control over any critical prosecutorial decisions." 263 F.3d at 1154. In fact, the Complaint states that the OSA, led by Harland Stonecipher (the other individual defendant) began to "actively conspire" to cause Erikson to be unlawfully tried for crimes he did not commit. *See* App. at 29a. Erikson alleged that Turpen, who represented the victims in the case against Erikson, contacted Pawnee County to state he was interested in being appointed special prosecutor. App. at 29a. According to the Complaint, the OSA then raised in excess of $25,000 which it contributed to Turpen, "in an effort to fund the unlawful prosecution of Erikson." App. at 30a. The Complaint further alleged that the OSA remained "actively" involved throughout the prosecution, that its membership "made death threats to Erikson and his family" and caused a "groundless civil suit" to be filed against Erikson. App. at 30a-31a.

Although not artfully pleaded or set forth in detail, the Complaint clearly alleged Turpen's position at the center of conspiratorial activity aimed at bringing a prosecution against Erikson. In his Objections to the Report and Recommendation of the Magistrate, Erikson also gave notice of further allegations he could make if permitted to amend. App. at 47a. (Although the Objections do not constitute a "motion" seeking leave to amend, they may fairly be read as informing the court of allegations that could be raised by Erikson in a properly pleaded Complaint. Erikson's counsel did not file a separate motion to amend the Complaint to add more facts concerning the Turpen issue or the probable cause issue). In the Objections, Erikson stated:

> If not for the efforts of third parties and private individuals, Erikson alleges he never would have been prosecuted for murder. It is remarkable that any private citizen could be subjected to the whims of non-governmental parties and placed on trial for his life on repeated occasions.

App. at 52a.

Although Erikson's attorney did not file a motion specifically seeking leave to amend, he also filed another pleading, entitled "Aid to the Court" which similarly gave notice of facts that Erikson believed he could prove. In that pleading, Erikson stated that the prosecutor solicited private funds to support his prosecution of Erikson and conspired with the Turpen, Stonecipher, the Riggs-Abney law firm and the OSA to prosecute Erikson. App. at 40a-41a.

With regard to the Fourth Amendment claim, the Tenth Circuit held that the "lack of probable cause" was not pleaded with sufficient specificity.[1] The Tenth Circuit stated:

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[1] The Tenth Circuit rejected the malicious prosecution claim because of the perceived pleading problem, at least in part. The appellate court also stated that it agreed with the magistrate judge's analysis, which included a determination that the "state court finding of probable cause sufficient to hold Plaintiff for trial" precluded litigation of the malicious prosecution claim in federal court. App. at 14a. The magistrate judge relied on *Hubbert v. City of Moore*, 923 F.2d 769 (10th Cir. 1991). *Hubbert* does not, however, mandate automatic dismissal of a section 1983 malicious prosecution claim when there has been a state court finding of probable cause. For instance, if probable cause is procured through fraud, the Tenth Circuit has allowed malicious prosecution claims to proceed despite a prior probable cause finding. *See Robinson v. Maruffi*, 895 F.2d 649

> Under Oklahoma law, a lack of probable cause to bring a criminal prosecution is an essential element of the tort of malicious prosecution. *See Parker v. City of Midwest City*, 850 P.2d 1065, 1067 (Okla. 1993). Here, beyond the conclusory allegation in his complaint that no probable cause existed, plaintiff has not alleged any specific facts showing there was a lack of probable cause for his arrest and prosecution on the charges of first degree murder. Plaintiff's conclusory allegation is insufficient to survive the defendants' motion to dismiss.

Erikson, 263 F.3d at 1154.

Again, in his Objections to the Magistrate's Report and Recommendation, Mr. Erikson gave notice of further allegations that could be added to his Complaint. The pleading stated:

> Additionally, Erikson has indicated that evidence at the scene of the incident may have been tampered with by law enforcement officials and then utilized for purposes of establishing probable cause against him. If Erikson has not made that allegation as clear as he should for consideration by the Court, *he will gladly amend his Complaint to assert his allegation more clearly.*

App. at 50a-51a.

Mr. Erikson thus gave notice to the district court of additional facts he could allege would establish the lack

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(10th Cir. 1990). Further, there is disagreement among the circuits on whether a section 1983 claim based on malicious prosecution in any instance should depend on state law. *See Brummett v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991).

of probable cause and point to the defendants' efforts to manufacture probable cause against him. *See* footnote 1.

Summary of Allegations in the Complaint

The allegations in the Complaint generally state as follows:

Michael Erikson was tried for murder, then manslaughter, then was scheduled for a third trial before authorities abandoned their efforts to prosecute him. Michael Erikson was not guilty of anything. He has no criminal record, not even a traffic violation. App. at 34a.

For six years, prosecutors pursued Erikson, even though the facts overwhelmingly supported his account that he acted in self defense. App. at 23a-34a.

On the night of June 26, 1992, Erikson was watching his family's property in rural Pawnee County. The Eriksons had been victims of recent thefts. While he was standing guard, Erikson was confronted by Fred Head, Jr., and Tony McCollum. Instead of leaving, they began beating Erikson with a chain and otherwise assaulted him. Erikson eventually shot and killed Head and McCollum. App. at 27a.

Both Head and McCollum were known in the local community as dangerous individuals, and both were avid raccoon hunters and conducted hunting expeditions over private property. App. at 27a.

Mr. Erikson reported the shooting to law enforcement and waited at the scene for their arrival. He was taken to the Payne County jail where he gave a voluntary written statement and was interrogated for several hours. After

three days in the Payne County jail, authorities advised Erikson that charges likely would not be filed. App. at 28a-29a.

Shortly after the incident, the OSA, led by Stonecipher, began to "actively conspire" to have Erikson prosecuted. Three days after the shootings, the district attorney in neighboring Pawnee County received a phone call from Turpen, a private attorney. Turpen, acting at the behest of the alleged victims' families, offered to help prosecute Erikson. The next day, first degree murder charges were filed in Pawnee County. App. at 29a.

The OSA, a group which promotes raccoon hunting, solicited donations nationally and funneled the money to Turpen, who used it to aid the prosecution effort. The State of Oklahoma pursued Mr. Erikson until September 1998, when the third prosecution was dismissed, without prejudice. App. at 30a-33a.

On September 16, 1999, less than one year after the third prosecution was dismissed, Erikson filed his civil rights Complaint in the United States District Court for the Northern District of Oklahoma. App. at 24a. The Complaint alleged conspiracy, malicious prosecution, abuse of process, intentional infliction of emotional distress, and an unspecified violation of the Fourteenth Amendment. The Complaint named six defendants including the Pawnee County Board of County Commissioners; the Prosecutor, Larry Stuart; Mr. Turpen; Mr. Turpen's law firm, Harland Stonecipher; and the OSA.

The Complaint alleged that contributions from the OSA "persuaded the District Attorney of Pawnee County to maliciously prosecute Erikson. . . . " App. at 34a. The

Complaint also alleged that "Pawnee County's goals were driven by the OSA and other politicians despite the fact the state's evidence did not support the continuation of the process." App. at 35a.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S AND DISTRICT COURT'S DISMISSAL OF MR. ERIKSON'S CIVIL RIGHTS COMPLAINT ON THE GROUND IT WAS NOT SUFFICIENTLY SPECIFIC CONFLICTS WITH RULE OF *CRAWFORD-EL V. BRITTON*; THIS COURT'S REVIEW IS WARRANTED BECAUSE THE CIRCUIT COURTS HAVE ADOPTED DIVERGENT APPROACHES AS TO WHETHER A HEIGHTENED PLEADING STANDARD IS REQUIRED IN CIVIL RIGHTS CASES INVOLVING INDIVIDUAL DEFENDANTS

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court addressed the necessary balancing that must occur between the rights of Plaintiffs with "bona fide constitutional claims" and the rights of public officials, who must be protected from "burdensome discovery" arising from meritless claims. *Crawford-El*, 523 U.S. at 595-98. Balancing those competing concerns, this Court rejected the argument that Plaintiffs in civil rights cases should be required prove the "improper motive" of public officials by "clear and convincing evidence." *Id.* at 594-98.[2] At the

[2] The Court stated: "The broad question presented is whether the courts of appeals may craft special procedural rules for such cases [civil rights cases requiring proof of improper

same time, the Court noted that district courts should manage the discovery process so as to protect public officials from undue burdens. Thus, when a plaintiff files a complaint against an individual defendant[3] alleging a wrongful motive, the district court:

> [M]ust exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district has *two primary options* prior to permitting any discovery at all. First, the court *may order a reply* to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or *grant the defendant's motion for a more definite statement* under Rule 12(e).

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motive] to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. The more specific question is whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment." 523 U.S. at 577.

[3] This Court decided that no heightened pleading requirement exists when a plaintiff attempts to bring a civil rights suit against a municipality. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). However, this Court left open the question in *Leatherman* of whether heightened pleading is required in suits against individual government officials: "These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under section 1983. In short, a municipality can be sued under section 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury." This Court thus held that it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 166-67. *But see Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Crawford-El, 523 U.S. at 597-98 (emphasis added). Thus, this Court explained, the district "may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598.

Under the analysis of *Crawford-El*, therefore, the district court is required to be mindful of the allegations and to manage the pleading and discovery stages so as to balance the competing concerns of both parties. If a complaint is insufficient, there are "two primary options" – requiring a reply or a more definite statement. *Id.* The court can thus require the plaintiff to put forth "specific, nonconclusory factual allegations" that support the claim of improper motive. *Id.* Necessarily contained in all of these options or suggestions is the requirement that the plaintiff be permitted to re-plead, reply, or otherwise augment the pleadings so as to comply with all requirements. Nowhere does *Crawford-El* state that dismissal should be the first option, with no opportunity to cure any defects in the pleadings.

The language from *Crawford-El* concerning "specific, nonconclusory factual allegations" has spawned a host of divergent opinions and seemingly given rise to a split in the courts of appeal.

An examination of recent case law reveals that some circuits have interpreted the phrase to require a heightened standard of pleading in civil rights cases involving government officials as individual defendants. For instance, the First Circuit has required specificity in pleading a civil rights complaint alleging discrimination

on the part of police officers and a medical examiner. *See Judge v. Lowell*, 160 F.3d 67, 74-75 (1st Cir. 1998). In *Judge*, the First Circuit stated that the district court could demand that improper motive "be pleaded not just conclusorily" but by "specific, nonconclusory factual allegations giving rise to a reasonable inference of [improper] intent." *Judge*, 160 F.3d at 75.

The Tenth Circuit, in Mr. Erikson's case, apparently subscribed to the point of view that the district court may require a heightened pleading standard regarding motive in civil rights cases involving individuals. In its brief opinion, however, the Tenth Circuit neither mentioned *Crawford-El* nor stated that the standard in civil rights cases was any different from the standard in any other type of civil case. The two authorities cited in support of the Tenth Circuit's determination that a "conclusory allegation is insufficient," 263 F.3d at 1154-55, are, however, civil rights cases. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990).

A Tenth Circuit case decided a few months before *Erikson* did expressly address pleading requirements in light of *Crawford-El*, however. *See Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). In *Currier*, the Tenth Circuit initially interpreted *Crawford-El* as prohibiting the fashioning of rules requiring heightened pleading standards in civil rights cases involving individual defendants. *Currier*, 242 F.3d at 912-17. However, the Tenth Circuit further determined that a heightened pleading standard was acceptable, after all, *if* it was imposed by the District Court, rather than the Court of Appeals:

> Finally, to the extent the Supreme Court considered whether a court may require a plaintiff to plead " 'specific nonclusory factual allegations' " to survive a prediscovery motion for dismissal, it concluded this option resides in the *discretion of federal trial judges, not federal circuit courts.*

242 F.3d at 917 (emphasis added) Dismissal, then was deemed inappropriate in *Currier* because the trial court "thought Plaintiffs had alleged sufficient facts to be allowed discovery." *Id.*

Thus, the Tenth Circuit may have adopted in *Currier* an approach that eschews a hard-and-fast rule but instead vests discretion in the district court.

Contrasting with these views, the Seventh Circuit and District of Columbia Circuits have interpreted *Crawford-El* as permitting *no* heightened pleading requirement in civil rights cases. *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998); *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000). In *Nance*, the Seventh Circuit stated flatly: "Civil rights complaints are not held to a higher standard than complaints in other civil litigation." *Nance*, 147 F.3d at 590 (citing *Crawford-El*). The plaintiff in *Nance* alleged that the defendant "acted intentionally"; "nothing more is required," stated the Seventh Circuit.

In a similar vein is the holding in *Harbury*, where the District of Columbia Circuit stated that this Court, in *Crawford-El*, "held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard." *Harbury*, 233 F.3d at 611. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir.

1999) (plurality opinion) (*Crawford-El* disallows heightened pleading standard). Further, some courts, even prior to *Crawford-El*, did not require specificity in the pleading of non-municipality civil rights cases. *E.g., Ortega v. Christian*, 85 F.3d 1521 (11th Cir. 1996) ("boilerplate" and "vague" allegations of false arrest and false imprisonment stated a cause of action requiring further proceedings to develop the record).

As the above-cited cases illustrate, there is a sharp lack of agreement among the circuits as to the meaning of *Crawford-El* and whether civil rights cases operate by more stringent pleading requirements with regard to allegations of improper motive. Resolution by this Court is necessary to maintain uniformity among the circuits and resolve a critical question that is certain to arise repeatedly in civil rights litigation.

At a minimum, three divergent views exist regarding whether *Crawford-El* requires civil rights complaints to state allegations of improper motive against individual defendants with greater specificity:

> (1) Following *Crawford-El*, heightened pleading requirements are still appropriate in civil rights cases against individual defendants. This point of view is espoused in the First Circuit's decision in *Judge v. Lowell*;
>
> (2) *Crawford-El* prohibits heightened pleading requirements regarding improper motive against individual defendants. The Seventh Circuit's *Nance* decision and the District of Columbia Circuit's *Harbury* decision are representative of this second line of authority;

> (3) *Crawford-El* does not permit Courts of Appeal to require heightened pleading standards, but leaves to the determination of the district judge whether a heightened standard is appropriate in a case. The determination is that district judges may require heightened standards of pleading in individual defendant cases, but Courts of Appeals may not. This is the position taken in by the Tenth Circuit in *Currier v. Doran*.

The grant of certiorari is necessary not only to resolve the circuit split but also to permit a proper resolution of Mr. Erikson's case. At present, his case stands dismissed, and, as noted in Point II, *infra*, his case was dismissed before there was any opportunity provided to amend the pleadings. This dismissal violated Erikson's Fifth Amendment right to due process of law. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914). "The fundamental requisite of due process of law is the opportunity to be heard." *Id.* This opportunity was denied Mr. Erikson.

The adequacy of the Complaint concerns two specific allegations: the claim that the private defendants motivated or controlled the prosecution; and the claim that officials lacked probable cause to pursue the prosecution.

With regard to the "private interests" claim, Mr. Erikson clearly stated a number of factual allegations that appeared fairly specific yet did not satisfy the court. Under *Crawford-El*, it would appear that the district court's "primary options" would have been to require a "reply" or a "more definite statement." The district court did neither. Erikson's allegations certainly concerned the issues of influence and improper motive. He in fact stated

that the OSA, as led by Stonecipher, "persuaded the District Attorney . . . to maliciously prosecute Erikson." App. at 34a. He also stated that the prosecutorial goals "were driven by the OSA." App. at 35a. These allegations, along with the other more specific allegations, would appear to adequately state a claim – especially when considered alongside the statements made in Erikson's Objections to the Magistrate's Report and his pleading entitled "Aid to the Court," discussed *supra*. As *Crawford-El* suggests, the district court had "options" that would have allowed Mr. Erikson to strengthen or augment his allegations. The district court did not select these options and instead abruptly terminated Mr. Erikson's litigation.

Mr. Erikson's case squarely presents the issue of what *Crawford-El* requires. Does that decision strictly demand a "heightened pleading standard" and require dismissal of the complaint if the allegations fall short? Or, does *Crawford-El* grant the district court discretion to determine whether heightened pleading is appropriate and what procedural vehicle should be employed to achieve a greater degree of specificity? Or, does *Crawford-El* impose no heightened pleading requirement, as the District of Columbia and Seventh Circuits have concluded?

Mr. Erikson respectfully submits that under any of these formulations, he should prevail as he was abruptly and prematurely dismissed from court.

The Tenth Circuit also concluded that Mr. Erikson did not adequately plead the lack of "probable cause." The

appellate court stated that the allegations were not sufficiently specific on this issue.[4] *Erikson*, 263 F.3d at 1154. The Complaint shows that Erikson alleged that the prosecution was "malicious" and lacking in sufficient evidence. If these allegations are deemed insufficient, the court may certainly construe the Objections to the Magistrate's Report as seeking leave to amend. In that pleading, Erikson alleged that physical evidence may have been tampered with in an effort to engineer probable cause when in fact no such probable cause existed. App. at 50a-51a.

At a minimum, *Crawford-El* would appear to suggest that Erikson should have been granted the opportunity to reply or file a more definite statement. Dismissal was not an appropriate remedy at that stage, particularly given the lack of clear-cut authority as to whether heightened pleading requirements may indeed be properly applied to civil rights cases against individual defendants.

Thus, the Court of Appeals' requirement of specific pleading in this case was not based on a clear-cut authority and had the result of defeating, with no consideration on the merits, a serious civil rights lawsuit. These actions by the district court and the court of appeals violated Mr. Erikson's right to due process and should be remedied by this Court.

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[4] The Tenth Circuit did not analyze the claim in terms of the establishment of probable cause through fraud. However, state of mind would always be at issue because proving what law enforcers knew or were motivated by would be necessary under any formulation of the probable cause issue.

II THE DISMISSAL WITHOUT PROVIDING AN OPPORTUNITY TO AMEND WAS IN CONFLICT WITH CONTROLLING AUTHORITY OF THIS COURT AND WITH FUNDAMENTAL POLICIES BEHIND THE FEDERAL RULES OF CIVIL PROCEDURE

As amply discussed above, Mr. Erikson could have easily supplied the specific allegations which the Court of Appeals found missing. He could have been permitted to reply or amend. The district court could have required a more definite statement under Rule 12(e). The district court's precipitous action and the Tenth Circuit's affirmance of it run contrary to the spirit and intent of the Rules of Civil Procedure and also contravene the requirements of the Due Process Clause.

On page 5 of his Objection to the Magistrate's Report, Mr. Erikson's counsel stated that he was prepared to allege that the charges would not have been filed if it were not for the interference of private interests. App. at 52a.

In upholding dismissal, the Court of Appeals relied on the lack of allegation that the private interests actually controlled prosecutorial decision-making.

Also, as stated in the Objections to the Magistrate's Report, Erikson was prepared to allege that tampering with the crime scene resulted in probable cause being manufactured through fraud. App. at 50a-51a.

Thus, it appears likely that two alleged pleading defects at issue here could have been easily cured through timely amendment by relying on allegations that had already been presented to the district court.

Failure to offer the opportunity to cure through amendment is contrary to this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962) (amendments to pleadings are to be freely allowed, even after a complaint has been dismissed). Further, the liberal pleading decisions of this Court recognize: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. . . . " *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The writ should be granted because the dismissal without allowing amendment is contrary to well-established provisions of federal law, including the Fifth Amendment of the United States Constitution.

CONCLUSION

Based on the foregoing arguments and authorities, Mr. Erikson respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

MARK BARRETT OK #557
Counsel of Record
P.O. Box 896
Norman, OK 73070
(405) 364-8367
Attorney for Petitioner

CHERYL A. PILATE MO #42266
WYRSCH HOBBS &
MIRAKIAN, P.C.
1101 Walnut, Suite 1300
Kansas City, MO 64106
(816) 221-0080 Telephone
(816) 221-3280 Facsimile
Attorney for Petitioner

FILED
United States Court of Appeals
Tenth Circuit

AUG 23 2001

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MICHAEL ED ERIKSON,

Plaintiff-Appellant,

No. 00-5190

v.

PAWNEE COUNTY BOARD OF COUNTY COMMISSIONERS, Pawnee County, an Oklahoma political subdivision, ex rel.; LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties; HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association; OKLAHOMA SPORTSMAN'S ASSOCIATION; MICHAEL TURPEN, individually and as an employee and Shareholder of the law firm Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.; RIGGS, ABNEY, NEAL, TURPEN, ORBISON, & LEWIS, INC., an Oklahoma professional corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 99-CV-786-BU)

Submitted on the briefs:

Brett D. Sanger of Brett D. Sanger, P.C., Oklahoma City, Oklahoma, for Plaintiff-Appellant.

S.M. Fallis, Jr., of Nichols, Wolfe, Stamper, Nally, Fallis & Robertson, Inc., and Douglas A. Wilson of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., Tulsa, Oklahoma, for Defendants-Appellees.

Before SEYMOUR and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

SEYMOUR, Circuit Judge.

Plaintiff Michael Ed Erikson is appealing the district court's dismissal of his civil rights claims brought under 42 U.S.C. § 1983.[1] The district court dismissed plaintiff's case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. We review the district court's dismissal de novo "accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." *Yoder v. Honeywell, Inc.*, 104 F.3d 1224 (10th Cir. 1997) (quotation omitted). We affirm.

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

I.

On June 26, 1992, plaintiff shot and killed Tony McCollum and Fred Head on his family's ranch property. Although plaintiff claimed he killed McCollum and Head in self defense, he was subsequently charged with two counts of first degree murder in Pawnee County, Oklahoma. At plaintiff's trial, the jury was instructed on murder, voluntary manslaughter, and self defense, and acquitted plaintiff on all charges for the death of Head. The jury could not reach a unanimous verdict with respect to the charges for the death of McCollum, and a mistrial was declared. Plaintiff was retried on the charge of voluntary manslaughter for the death of McCollum. At the second trial, the jury again failed to reach a unanimous verdict on the manslaughter charge, and another mistrial was declared. A third prosecution on the charge of voluntary manslaughter for the death of McCollum was dismissed without prejudice.

Plaintiff then filed suit against defendants under § 1983 alleging that they violated his federal civil rights by conspiring to prosecute him for the deaths of Head and McCollum without probable cause or sufficient evidence. Plaintiff further alleged that his federal due process rights were violated because the private defendants (the Oklahoma Sportsman's Association (OSA), Harland Stonecipher, who is the president of the OSA, and attorney Michael Turpen and his law firm, who represented the Head and McCollum families) actively participated in and influenced the state prosecution. Specifically, plaintiff alleged the OSA raised in excess of $25,000 from its membership and contributed the money to defendant

Turpen for use in providing research assistants and investigators to assist defendant Stuart in prosecuting plaintiff.[2] Plaintiff also asserted state law claims against defendants for malicious prosecution, malicious abuse of process, civil conspiracy, intentional infliction of emotional distress, and punitive damages.

Defendants filed motions to dismiss under Fed. R. Civ. P. 12(b)(6). The magistrate judge recommended that the district court grant the motions on the grounds that: (1) under Oklahoma law, a district attorney is an arm of the state and thus defendant Pawnee County is not liable for the official acts of defendant Stuart, *see Arnold v. McClain*, 926 F.2d 963, 965-66 (10th Cir. 1991); (2) as a state officer under Oklahoma law, defendant Stuart is entitled to Eleventh Amendment immunity from actions against him in his official capacity, *see id.* at 966; (3) defendant Stuart is not liable to plaintiff in his individual capacity because: (a) he is entitled to absolute prosecutorial immunity from suits under § 1983, *see Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), and (b) he is entitled to qualified immunity because plaintiff failed to allege sufficient facts showing he violated a clearly established federal statutory or constitutional right, *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982);[3] and (4) plaintiff failed

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[2] Plaintiff alleges that Oklahoma law prohibited defendant Stuart from accepting assistance from the private defendants in prosecuting plaintiff. We agree with the conclusion of the magistrate judge that, without more, any such violation of state law is not actionable under § 1983.

[3] Plaintiff contends he could have overcome defendant Stuart's qualified immunity defense if the district court had permitted him to file an amended complaint. However, after

to state a claim against the private defendants under § 1983 because he failed to allege sufficient facts to show their conduct violated a federal statutory or constitutional right. The district court accepted the magistrate judge's recommendations and granted defendants' motions to dismiss.

II.

We agree with the magistrate judge's analysis. For additional reasons not expressly articulated by the magistrate judge, we also agree that plaintiff has failed to allege a federal constitutional violation. First, the participation of a privately-retained attorney in a state criminal prosecution does not violate the defendant's right to due process under federal law unless the private attorney effectively controlled critical prosecutorial decisions. *See East v. Scott*, 55 F.3d 996, 1000-01 (5th Cir. 1995); *Person v. Miller*, 854 F.2d 656, 663-64 (4th Cir. 1988). Such decisions include "whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." *Person*, 854 F.2d at 664. Plaintiff has not alleged that defendant Turpen exercised control over any critical prosecutorial decisions. Instead, plaintiff only alleges that

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defendants filed their motions to dismiss, plaintiff only sought leave to amend with respect to defendant Stuart to assert a claim against him in his individual capacity without requesting leave to amend any of the substantive allegations in his complaint. Moreover, plaintiff has failed to identify any additional relevant facts that he could have included in an amended complaint to defeat defendant Stuart's qualified immunity defense.

defendant Turpen, acting on behalf of the OSA, provided research assistants and investigators to assist defendant Stuart. This is insufficient to state a claim for a federal due process violation.[4]

Second, plaintiff has failed to allege sufficient facts to support a Fourth Amendment claim for malicious prosecution under § 1983. In this circuit, state law provides the starting point for analyzing a Fourth Amendment claim for malicious prosecution under § 1983. *See Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996). Under Oklahoma law, a lack of probable cause to bring a criminal prosecution is an essential element of the tort of malicious prosecution. *See Parker v. City of Midwest City*, 850 P.2d 1065, 1067 (Okla. 1993). Here, beyond the conclusory allegation in his complaint that no probable cause existed, plaintiff has not alleged any specific facts showing there was a lack of probable cause for his arrest and

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[4] In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987), the Supreme Court held that an attorney for a party in a position to gain from a criminal contempt proceeding cannot be appointed by the district court to prosecute the party charged with contempt. The Court determined that, because of the inherent conflict of interest and potential for misconduct, the use of an interested private attorney to prosecute a contempt citation is fundamental error. *Id.* at 814. *Young* is distinguishable because, unlike the situation here, the private attorney was the government's sole representative in the contempt trial, *see East*, 55 F.3d at 1000 n.2, and he had complete authority over all aspects of the prosecution, *see Person*, 854 F.2d at 662-63. *Young* is also distinguishable on the grounds that the Supreme Court decided the case under its supervisory power over the federal courts, and not as a matter of federal constitutional law. *See Young*, 481 U.S. at 790; *East*, 55 F.3d at 1000 n.2.

prosecution on the charges of first degree murder. Plaintiff's conclusory allegation is insufficient to survive defendants' motions to dismiss. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (stating that "conclusory allegations without supporting factual averments are insufficient to state a claim"); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990) (stating that district court is not required to accept "footless conclusions of law" in ruling on motion to dismiss).[5]

Finally, plaintiff has alleged a number of additional wrongs in connection with his criminal prosecution, including that: (1) state law enforcement officials contorted his voluntary statements; (2) the OSA issued false media releases; (3) unidentified OSA members disrupted plaintiff's trials and made death threats to plaintiff; (4) the hold-out juror for a conviction in plaintiff's first trial was a friend of McCollum's and he perjured himself to

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[5] Plaintiff has also failed to state a claim under federal law for abuse of process. As with claims for malicious prosecution, state law provides the elements for a claim of abuse of process under § 1983. *See Cook v. Sheldon*, 41 F.3d 73, 79-80 (2d Cir. 1994). Under Oklahoma law, an "ulterior or improper purpose" is an essential element of the tort of abuse of process. *Callaway v. Parkwood Village, L.L.C.*, 1 P.3d 1003, 1004 (Okla. 2000). Because plaintiff has failed to allege facts showing that defendants conspired to prosecute him with an ulterior or improper motive separate and apart from the alleged desire to obtain first degree murder convictions without probable cause, plaintiff's allegations should only be analyzed in terms of an attempt to plead a claim for malicious prosecution. *See Wolford v. Lasater*, 78 F.3d 484, 490 (10th Cir. 1996) (explaining differences between abuse of process and malicious prosecution and holding that challenge to allegedly baseless criminal prosecution is more appropriately characterized as claim for malicious prosecution).

become a juror; and (5) defendants caused a groundless civil suit to be filed against plaintiff. While these allegations are troubling, plaintiff has failed to articulate a federal constitutional claim based on any of these alleged wrongs, and/or he has failed to link any of the named defendants to the alleged misconduct.

We AFFIRM the district court's order of dismissal.[6]

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[6] The district court's order of dismissal did not specifically address plaintiff's state law claims. However, plaintiff has not raised any issues on appeal with respect to his state law claims, and we will assume that, pursuant to 28 U.S.C. § 1367(c)(3), the district court has declined to exercise supplement jurisdiction over the state law claims. *Cf. Taylor*, 82 F.3d at 1564, n.11 (affirming district court order granting defendant summary judgment in § 1983 case even though district court failed to specifically address plaintiff's state law claims).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL ED ERIKSON,

Plaintiff-Appellant,

v.

PAWNEE COUNTY BOARD OF COUNTY COMMISSIONERS, Pawnee County, an Oklahoma political subdivision, ex rel.; LARRY STEWART, in his official capacity as District Attorney for Osage and Pawnee Counties; HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association; OKLAHOMA SPORTSMAN'S ASSOCIATION; MICHAEL TURPEN, individualy [sic] and as an employee and sharelolder [sic] of the law firm Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.; RIGGS ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Defendants-Appellees.

No. 00-5190
D.C. No.
99-CV-786-BU
(Northern District
of Oklahoma)

JUDGMENT

Filed August 23, 2001

Before **SEYMOUR, McKAY** and **BRORBY**, Circuit Judge.

This case originated in the Northern District of Oklahoma and was submitted on the briefs at the direction of the court.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ Lisa Sallgos
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ED ERIKSON, Plaintiff, vs. PAWNEE COUNTY, an Oklahoma political subdivision, ex rel, BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, et al., Defendants.	)	Case No. 99-CV-786-BU(M)

ORDER

(Filed Aug. 18, 2000)

On June 20, 2000, United States Magistrate Judge Frank H. McCarthy issued a Report and Recommendation, wherein he recommended that the Motion to Dismiss of Defendant Larry Stuart, the Motion to Dismiss of Pawnee County, the Motion to Dismiss of Defendant Oklahoma Sportsman's Association, the Motion to Dismiss of Defendant Harland Stonecipher and the Motion to Dismiss of Michael Turpen and Riggs, Abney, Neal, Turpen, Orbinson & Lewis, Inc. be granted, that the Motion to Join Additional Party Defendant be denied and that Pawnee County's Rule 11 Motion be denied.

Presently before the Court is Plaintiff's Objection to the Report and Recommendation of the Magistrate. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a de novo review of the Report and Recommendation to

which objections were made.[1] Having done so, the Court agrees with Magistrate Judge McCarthy's Report and Recommendation. The Court finds that Plaintiff's objections to the Report and Recommendation are without merit.

Accordingly, the Report and Recommendation (Docket Entry #66-1) issued by the United States Magistrate Judge Frank H. McCarthy is **AFFIRMED**. The Motion to Dismiss of Defendant Larry Stuart (Docket Entry #6-1), the Motion to Dismiss of Pawnee County (Docket Entry #9-1), the Motion to Dismiss of Defendant Oklahoma Sportsman's Association (Docket Entry #29-1), the Motion to Dismiss of Defendant Harland Stonecipher (Docket Entry #30-1) and the Motion to Dismiss of Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. (Docket Entry #31-1) are **GRANTED**. The Motion to Join Additional Party Defendant (Docket Entry #13-1) is **DENIED**. Pawnee County's Rule 11 Motion (Docket Entry #62-1) is **DENIED**.

ENTERED this 18 day of August, 2000.

/s/ Michael Burrage
MICHAEL BURRAGE
UNITED STATES
DISTRICT JUDGE

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[1] The Court notes that neither Plaintiff nor Defendant, Pawnee County, submitted an objection to Magistrate Judge McCarthy's recommendation that Pawnee County's Rule 11 Motion be denied. With no objection being filed, the Court accepts Judge McCarthy's recommendation in toto and concludes that Pawnee County's Rule 11 Motion should be denied.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ED ERIKSON,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CASE NO.
	)	99-CV-786-BU (M)
PAWNEE COUNTY, an Oklahoma political subdivision, ex rel BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY,	)	
LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties,	)	
HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association,	)	
OKLAHOMA SPORTSMAN'S ASSOCIATION,	)	
MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., and	)	
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,	)	
	)	
DEFENDANTS.	)	

REPORT AND RECOMMENDATION

(Filed Jun. 20, 2000)

This report and recommendation addresses the following motions which have been referred to the undersigned United States Magistrate Judge: the Motion to Dismiss of Defendant Larry Stuart [Dkt. 6-1]; the Motion to Join Additional Party Defendant [Dkt. 13-1]; the Motion to Dismiss of Pawnee County [Dkt. 9-1]; the Motion to Dismiss of Defendant Oklahoma Sportsman's Association [Dkt. 29-1]; the Motion to Dismiss of Defendant Harland Stonecipher [Dkt. 30-1]; the Motion to Dismiss of Defendants Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. [Dkt. 31-1]; and Defendant Pawnee County's Rule 11 Motion [Dkt. 62-1].

Standard of Review for Motion To Dismiss

The Defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted only if it appears that Plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Maez v. Mountain States Tel. & Tel. Inc.*, 54 F.3d 1488 (10th Cir. 1995). All well pleaded factual allegations in Plaintiff's complaint must be accepted as true and the Court will indulge all inferences in Plaintiff's favor. *Lafoy v. HMO Colorado*, 988 F.2d 97 (10th Cir. 1993).

Factual Allegations in Plaintiff's Complaint

Plaintiff alleges that on June 26, 1992, while acting in self-defense, he shot and killed Fred Head, Jr. and Tony

McCollum. Less than two days after the incident, Defendant Oklahoma Sportman's Association and Defendant Harland Stonecipher published media releases which, among other things, encouraged hunters to raise money for the prosecution of Plaintiff. On June 29, 1992, Defendant Michael Turpen called the Pawnee County District Attorney's office and advised Defendant Larry Stuart that he (Turpen) was representing the victims in the case against Plaintiff and indicated his (Turpen's) desire to be appointed as special prosecutor for the charges against Plaintiff. On June 30, 1992, Plaintiff was formally charged with two counts of first degree murder.

The Oklahoma Sportman's Association raised in excess of $25,000 to pursue and assist in the prosecution of Plaintiff. The money was given to Turpen at the law firm of Defendant Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. and was used to provide research assistance and investigators to Defendant Larry Stuart specifically for the prosecution of Plaintiff.

During the state court criminal proceedings the Court found probable cause to be established and held Plaintiff for trial on two counts of first degree murder. At the conclusion of the first trial, Plaintiff was acquitted of all charges concerning the death of Mr. Head and the jury did not reach a decision on the charge against Plaintiff for the death of Mr. McCollum. Plaintiff was tried a second time on criminal charges relating to the death of Mr. McCollum; again the jury failed to reach a verdict. In September 1998, shortly before Plaintiff's third trial for the death of Mr. McCollum, the Court dismissed the case without prejudice.

Pawnee County's Motion To Dismiss

Pawnee County seeks dismissal on the basis that the county is not liable for any actions of the District Attorney and that Plaintiff has not asserted any claims against the county independent of the actions of the District Attorney. *Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990).

Plaintiff does not deny that under the law Pawnee County is not responsible for the acts of the District Attorney. However, Plaintiff contends that the county may have had some involvement with the private funds used to assist in Plaintiff's prosecution or otherwise participated in Plaintiff's "wrongful prosecution."

Plaintiff's vague allegations unsupported by any specific factual assertions against Pawnee County are insufficient to defeat the motion to dismiss. In response to a motion to dismiss, Plaintiff must present specific factual allegations. *See Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (citing *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)) (plaintiff is required to "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred.)

Based upon the above, the undersigned RECOMMENDS that Pawnee County's Motion To Dismiss [Dkt. 9-1] be GRANTED.

Pawnee County's Rule 11 Motion

Defendant Pawnee County requests dismissal of Plaintiff's case against Pawnee County and other appropriate sanctions under Fed. R. Civ. P. 11. In light of the recommendation that the case be dismissed pursuant to Rule 12(b)(6), the undersigned does not recommend dismissal under Rule 11. Further, Pawnee County has not persuaded the undersigned that any sanction is appropriate under Rule 11. Therefore, the undersigned RECOMMENDS that Pawnee County's Rule 11 motion be DENIED.

Larry Stuart's Motion to Dismiss

Defendant Stuart has been sued in his official capacity as District Attorney for Osage and Pawnee Counties. A suit against a state official in his or her official capacity is a suit against the state. *Will v. Michigan Dep't. of State Police, et al.*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed. 2d 114 (1985). The State of Oklahoma and its agencies are entitled to Eleventh Amendment immunity in this action. *Florida Dep't. of Health & Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 67 L. Ed. 2d 132 (1981).

In his response, Plaintiff concedes that Eleventh Amendment immunity shields Defendant Stuart from monetary liability but urges that he may maintain an action against Defendant Stuart in his official capacity for prospective declaratory relief. Plaintiff's complaint does not state a claim for prospective declaratory relief nor does Plaintiff's response to Defendant Stuart's motion set forth a basis for such relief. The undersigned therefore

RECOMMENDS that the motion to dismiss of Larry Stuart, in his official capacity as District Attorney for Osage and Pawnee Counties [Dkt. 6-1], be GRANTED.

Plaintiff's Motion to Join Additional Party Defendant

Plaintiff requests that Larry Stuart, individually, be joined as a defendant in this case. In his official capacity Defendant Larry Stuart has lodged an objection, arguing that such an addition would be futile because, even in his individual capacity, Larry Stuart would be entitled to absolute prosecutorial immunity and qualified immunity.

A prosecutor is absolutely immune from damages for his or her actions in initiating or pursuing a criminal prosecution and in presenting the state's case. *Imbler v. Pachtman,* 424 U.S. 409, 47 L. Ed. 2d 128 (1976). This absolute immunity encompasses not only the conduct of the trial but all of the activities that can fairly be characterized as closely associated with the conduct of the litigation.

Although Plaintiff acknowledges the absolute immunity afforded to prosecutors, he argues that not all claims for damages against prosecutors are precluded by absolute immunity. Plaintiff contends that the Court must examine the specific conduct at issue to determine if absolute prosecutorial immunity applies. Plaintiff contends that Defendant Stuart conspired with the Oklahoma Sportman's Association, Harland Stonecipher and Michael Turpen at the law firm of Riggs, Abney, Neal, Turpen, Orbison and Lewis, Inc., to raise private funds to use in his prosecution. Such actions, Plaintiff claims, are

not\covered by prosecutorial immunity. However, Plaintiff's own description of the alleged wrongdoing indicates that the activities were undertaken specifically for the purpose of prosecuting him. As such, these activities are characterized as being closely associated with the conduct of the litigation and therefore fall within the protection of absolute prosecutorial immunity.

Defendant Stuart further contends that in his individual capacity, he would be protected by qualified immunity. Government officials performing discretionary functions enjoy qualified immunity from civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396 (1982). A plaintiff confronted with a defense of qualified immunity bears the burden of establishing that the law was both clearly established and that the defendant's conduct was unreasonable under the applicable standard. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988). Plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant violated it.

Although Plaintiff makes vague allegations that he was denied the right to a fair and impartial trial, the only specific factual allegations made by Plaintiff are that Stuart and the other defendants conspired to solicit and accept private monies to assist in his prosecution. Plaintiff does not articulate what constitutional right was allegedly violated by these activities. Plaintiff points to 19 Okla. Stat. §215.4 and claims that the duties of an Oklahoma District Attorney were violated. However, without more this is not actionable under Section 1983. *Davis v.*

Scherer, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139 (1984) (Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision).

Based upon the foregoing analysis, the undersigned RECOMMENDS that Plaintiff's Motion to Join Additional Party Defendant [Dkt. 13-1] be DENIED as Plaintiff would be unable to state a claim upon which relief may be granted against Larry Stuart in his individual capacity.

Motions to Dismiss of Stonecipher, Oklahoma Sportman's Association, Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.

Plaintiff grounds his federal cause of action against these private defendants on an allegation of a conspiracy to violate his civil rights under Section 1983. In turn, Plaintiff grounds his conspiracy claim against each of these defendants on his factual allegation that they participated in a scheme to solicit and accept private monies to aid the prosecution of Plaintiff. However, as noted above, Plaintiff fails to identify a federal constitutional or federal statutory right which would be violated by Defendants' alleged conduct. *See Jones v. Richards*, 776 F.2d 1244 (4th Cir. 1985) (no constitutional right impaired by involvement of private attorneys as prosecutors in criminal trial).

Further, the state court finding of probable cause sufficient to hold Plaintiff for trial precludes this issue in federal court, *Hubbert v. City of Moore*, 923 F.2d 769 (10th Cir. 1991) and thereby defeats any claim for a Section

1983 violation for malicious prosecution. *Wolford v. Lasater*, 78 F.3d 484 (10th Cir. 1996). And, Plaintiff's allegations of abuse of process do not state a Section 1983 claim. *Spear v. Town of West Hartford*, 954 F.2d 63 (2nd Cir. 1992).

Additionally, these defendants contend that Plaintiff's claims are barred by the Statute of Limitations and First Amendment immunity under the Noerr-Pennington Doctrine. *Eastern R. R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626 (1965). The undersigned has not reached these issues based upon the recommended disposition of the motions on other grounds.

Based upon the above, the undersigned RECOMMENDS that the Motions To Dismiss of Defendants Stonecipher, Oklahoma Sportman's Association, Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., [Dkt. 9-1, 29-1, 30-1, 31-1] be GRANTED.

Conclusion

The undersigned United States Magistrate Judge RECOMMENDS that: the Motion to Dismiss of Defendant Larry Stuart [Dkt. 6-1] be GRANTED; the Motion to Join Additional Party Defendant [Dkt. 13-1] be DENIED; the Motion to Dismiss of Pawnee County [Dkt. 9-1] be GRANTED; the Motion to Dismiss of Defendant Oklahoma Sportsman's Association [Dkt. 29-1] be GRANTED; the Motion to Dismiss of Defendant Harland Stonecipher [Dkt. 30-1] be GRANTED; the Motion to Dismiss of

Defendants Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., [Dkt. 31-1] be GRANTED; and Pawnee County's Rule 11 Motion [Dkt. 62-1] be DENIED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison,* 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse,* 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 20th day of June, 2000.

/s/ Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF OKLAHOMA

(1) MICHAEL ED ERICKSON,

Plaintiff,

vs.

(1) PAWNEE COUNTY, an Oklahoma political subdivision, ex rel, BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY,

(2) LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties,

(3) HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association,

(4) OKLAHOMA SPORTSMAN'S ASSOCIATION,

(5) MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Rigs, Abney, Neal, Turpen, Orbison & Lewis, Inc., and,

(6) RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Defendants.

Case No. 99CV0786BU(M)

COMPLAINT

(Filed Sep. 16, 1999)

COMES NOW the Plaintiff, Michael Ed Erikson, and for his causes of action against the Defendants, alleges and states as follows:

JURISDICTION

1. This is an action to recover damages pursuant to Title 42 of the United States Code, §§ 1983 and 1988. The statutes provide a civil right of action under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of this Court is predicated on Title 28 of the United States Code §§ 1331 and 1343.

2. Pursuant to Title 28 of the United States Code § 1367 Supplemental, the Plaintiff further invokes the pendant jurisdiction of this Court to consider any and all claims arising under applicable state law which normally would be tried in one single proceeding.

3. Concurrent with the filing of the instance action, Plaintiff has filed a Governmental Tort Claims, pursuant to 51 O.S. §§ 151, et seq., against Pawnee County, a political subdivision of the State of Oklahoma.

PARTIES

4. Michael Erikson is a resident of Alva, Woods County, Oklahoma.

5. Pawnee County is a political subdivision of the State of Oklahoma, United States of America located in

the United States District Court, Northern District of Oklahoma.

6. Larry Stuart is the acting District Attorney for Osage and Pawnee Counties and was acting District Attorney during all operative times with regard to this action and the incident in question.

7. Mike Turpen is a shareholder in the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., an Oklahoma professional corporation and former Attorney General of the State of Oklahoma.

8. The Oklahoma Sportsman's Association ("OSA") is an Oklahoma Association organized for the purpose of hunting and the promotion of hunting related activities and lobbying for hunter's rights.

9. Harland Stonecipher, at all operative times with regard to this action and the incident in question, was acting president of the OSA, a businessman and majority shareholder of Prepaid Legal Services, Inc., an Oklahoma corporation, of which Mike Turpen's law firm, Riggs, Abney, Neal, Turpen, Orbison & Lewis is or was acting general counsel.

THE INCIDENT

10. The incident that occurred which the instant causes of action are founded are summarized as follows:

(a) On or about June 26, 1992, Michael Erikson acted in self defense in the shooting deaths of Fred Head, Jr. and Tony McCollum.

(b) Michael Erikson was wrongfully charged with and tried for two (2) counts of first degree

murder and Pawnee County wrongfully prosecuted Mr. Erikson and sought the death penalty.

(c) The first trial resulted in Michael Erikson's acquittal for the death of Fred Head, Jr. and an eleven to one (11-1) vote for acquittal for the death of Tony McCollum.

(d) Michael Erikson was retried for the death of Tony McCollum which again resulted in a hung jury.

(e) Pawnee County again sought to retry Michael Erikson for voluntary manslaughter for the death of Tony McCollum which was later dismissed by the District Attorney.

FACTUAL ALLEGATIONS

11. Michael Erikson's (hereinafter "Erikson" and/or "Plaintiff") family farms and conducts ranching operations in rural Payne and Pawnee Counties in the State of Oklahoma. They are well respected in the community, and known as law-abiding citizens.

12. Erikson's family had encountered prior incidents of cattle theft and trespassing on their property on numerous occasions which caused substantial concerns to both Erikson and his family.

13. On the night of June 26, 1992, while watching his family's property in rural Pawnee County, Erikson was confronted and accosted by two (2) men, namely, Fred Head, Jr. ("Head") and Tony McCollum ("McCollum").

14. After being repeatedly beaten with a dog chain and suffering life threatening assault and battery, Erikson, acting out of self-defense, necessary to save his life, shot and killed both Head and McCollum.

15. Both Head and McCollum were known in the local community as dangerous individuals that had a colorful and notorious history of abusing and physically accosting others in the community.

16. Fred Head and possibly McCollum were known by the Plaintiff and the local community to carry firearms and other dangerous weapons on their person on a continual basis.

17. Both Head and McCollum were avid raccoon hunters.

18. Head and McCollum were known to have little or no respect for landowners' rights and based upon information and belief, regularly trespassed upon landowners' private property during their hunting expeditions.

19. Head and McCollum had prior criminal records, including physical violent assaults. Erikson and his family had been threatened by the two (2) men on previous occasions.

20. Based upon the information and belief, Head, McCollum and a third individual, Earl Coke, and/or his son, Earl Coke, Jr., had under no uncertain circumstances, intended to murder Michael Erikson on the night of June 26, 1992.

21. Prior to the referenced incident, Head was trespassing on Erikson's land and during a confrontation advised Erikson that he had shot and/or killed other men and in fact he would kill Erikson as well. Erikson considered Head's threats serious.

22. Erikson reported the threats made by Head to the Payne and Pawnee County Sheriffs' Departments and was advised to report any future incidents.

23. On the evening of June 26, 1992, as a result of a violent attack on his life, Plaintiff shot and killed Head and McCollum while acting in self defense.

24. Immediately after the shootings, Erikson drove to a nearby neighbor's house and instructed the neighbor to telephone law enforcement officials. Erikson promptly returned to the scene to wait for law enforcement.

25. During the initial investigation by law enforcement, Erikson voluntarily reenacted the events and was transported to the Payne County Jail whereby Erikson offered a voluntary written statement and was interrogated for several hours regarding the incident.

26. Erikson was certain he had committed no wrong; therefore, he waived his right to counsel. Unbeknownst to Erikson, law enforcement, whom he considered to be a protector of justice, would contort his voluntary statement and admissions to be used against him in charges of two (2) counts of first degree murder with the death penalty imposed.

27. After three (3) days of confinement in the Payne County Jail, Erikson was transported to Pawnee County. Upon leaving the Payne County Jail, Erikson was advised

that charges would likely not be filed. Upon arriving in Pawnee County, however, Erikson was advised that two (2) counts of first degree murder would be filed. Although both affidavits of probable cause indicate the incident took place in Payne County and despite the fact that no charges had been filed, Erikson continued to be held without a bond in the custody of the Pawnee County Sheriff.

28. Less than two (2) days after the incident, the OSA, lead by Harland Stonecipher, began to actively conspire to cause Erikson to be unlawfully tried for crimes he did not commit. The only facts present indicated clearly that Erikson acted in self-defense or he would have been murdered the night of June 26, 1999 [sic]. Without on scintilla of verifiable evidence, the OSA via Harland Stonecipher published untruthful media releases alleging Erikson had shot hunters in the road without cause and encouraged hunters to " . . . raise money for the prosecution. . .".

29. On June 29, 1992, the Monday following the Friday night shooting, Mike Turpen called the Pawnee County District Attorney's office and advised Larry Stuart that he was representing the victims in the case against Erikson. Remarkably, shortly thereafter, Mike Turpen and/or his office telephoned the Pawnee County District Attorney's office again indicating he was desirous of being appointed as special prosecutor in the charges against Michael Erikson.

30. On June 30, 1992, Erikson was formally charged with two (2) counts of first degree murder.

31. The OSA raised in excess of $25,000 from its membership specifically to pursue and assist in the prosecution of Erikson which was then "contributed" to former Attorney General, Mike Turpen, at the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, in an effort to fund the unlawful prosecution of Erikson. Presently, it is unknown whether the OSA volunteered the contribution to be donated to Pawnee County for the malicious prosecution of Erikson or whether District Attorney, Larry Stuart requested the funds for prosecution assistance.

32. Based upon information and belief, instead of being appointed special prosecutor, Turpen provided research assistants and investigators to Larry Stuart to be assigned specifically to the Erikson case, paid for with the funds provided by the OSA.

33. A Bill of Particulars was filed against Erikson citing two (2) counts of first degree murder with the death penalty imposed. Erikson was held over for trial and three (3) months passed before his bond hearing occurred. Remarkably, Erikson's bond was set at a mere $50,000 despite the fact he was facing the death penalty.

34. The OSA remained actively involved throughout the trials. Its membership made death threats to Erikson and his family. Based upon information and belief, Turpen, Stonecipher and/or Larry Stuart caused a groundless civil suit to be filed in Pawnee County not only against Erikson for alleged wrongful deaths of Head and McCollum, but also named Erikson's parents as defendants as well. The suit was dismissed by the Plaintiffs soon after it was filed.

35. Erikson was tried for two (2) counts of first degree murder in Pawnee County. OSA members attended the eight (8) day trial along with Mike Turpen and Harland Stonecipher. During the trial, OSA members intimidated Erikson and his family, passed hand-drawn pictures to Erikson's legal counsel with guns pointed to their heads, made death threats to Erikson and his immediate family and went as far as to attempt to spit on Erikson's legal counsel after the acquittal. Sheriffs and highway patrolmen restrained OSA members and escorted Erikson's legal counsel from Pawnee County after the trial.

36. Despite the disruption that occurred in the courtroom, the jury acquitted Erikson on the murder and on the lesser included charge of voluntary manslaughter for the death of Head.

37. The jury deliberated and returned an eleven to one (11-1) vote in favor of acquittal for McCollum's death. After the verdict, jurors were polled and it was confirmed that the one (1) juror who refused to deliberate was a friend of McCollum's and had, in fact, perjured himself to become a jury member. The remaining jurors stated there was no way Erikson acted in any manner other than in self-defense.

38. Despite an affidavit from fellow jurors evidencing the jury misconduct, no perjury charges were brought against Tony McCollum's friend and obvious ally.

39. Allegedly, at the urging of the OSA, a second Bill of Particulars for first degree murder was filed against Erikson for the death of McCollum. The same disruption and misbehavior transpired in the courtroom,

yet the jury returned an eight to four (8-4) verdict to acquit Erikson on all counts.

40. While most uninfluenced and unbiased prosecutors would realize a jury of Erikson's peers was not going to convict Erikson because his actions were clearly in self-defense, at the urging of the OSA and other unknown sources, Pawnee County relentlessly pursued an amended charge of voluntary manslaughter against Erikson.

41. At this point, Erikson's family had spent in excess of $600,000 to defend Pawnee County's meritless claims and was financially exhausted. Erikson dismissed his legal counsel for lack of additional funds and represented himself *pro se* through the rest of the proceedings.

42. Erikson repeatedly requested a public defender but was denied until he produced his family's financial statements. Several months passed and finally, a public defender was appointed for Erikson's defense.

43. It was not until approximately fifteen (15) days before the commencement of the third Erikson trial, that Larry Stuart offered Erikson a plea bargain. although there was absolutely no change in evidence, Mr. Stuart offered Erikson a deferred voluntary manslaughter plea with a five (5) year deferred sentence and expungement after five (5) years. Because Erikson knew he had committed no crime and had been forced to defend himself for several years accordingly, he refused the District Attorney's offer.

44. Shortly prior to the third scheduled trial date, Larry Stuart advised Erikson's defense counsel he would

not oppose a motion to dismiss. A motion to dismiss was presented to the Court and granted. The Court dismissed the case without prejudice in September, 1998. Although the Court proceedings temporarily ended, Erikson continued to suffer from the wrongful and malicious prosecution monetarily and emotionally.

45. On May 17, 1999, Erikson petitioned the Court for return of his property, including the rifle used to defend himself as well as certain bullet fragments for purposes of inspection by an independent ballistics expert. Erikson's request was met with biased refusal, including innuendos and an implied threat that yet a fourth case may be filed against him. Erikson's intent regarding the return of the property was to have it examined by an independent ballistics expert because he believed evidence may have been tampered with by third parties and/or law enforcement officials.

46. The Assistant District Attorney and the Court made comments such as Erikson (1) "Murdered the two (2) men in cold blood"; and (2) "It is beyond the Court to understand why it is that Mr. Erikson could wish to have the .30 caliber fragment of the bullet removed from Fred Head's body unless it would be as a trophy or some perverse desire to have some momento from what would ordinarily be a very negative experience . . . "; and (3) the Court continued by stating "it's beyond me to understand why this Court should be a party to giving Mr. Erikson some trophy from this bad experience . . . ". Such comments were warrantless and evidence the bias and vengeance Pawnee County representatives unnecessarily harbor toward Erikson.

47. Erikson had no criminal record not even a misdemeanor driving offense, yet law enforcement wrongfully classified him as a murderer. There was not one scintilla of evidence to justify the treatment of Erikson as a murderer yet Pawnee County, by virtue of contributions from the OSA, persuaded the District Attorney of Pawnee County to maliciously prosecute Erikson for two (2) counts of first degree murder and fund and pursue two (2) maliciously prosecuted trials.

FIRST CLAIM FOR RELIEF
Malicious Prosecution

48. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 47 of his Complaint.

49. Pawnee County officials, specifically Larry Stuart, maliciously prosecuted Erikson by pursuing actions and penalties of first degree murder with the death penalty imposed. Based upon the evidence submitted, Erikson's actions were clearly in self-defense.

50. Pawnee County and others conspired to maintain a malicious action against Michael Erikson with want of probable cause which eventually terminated in his favor.

51. Plaintiff is entitled to relief for the damages he sustained as a result of Defendants' actions.

SECOND CLAIM FOR RELIEF
Malicious Abuse of Process

52. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 51 of his Complaint.

53. Pawnee County continuously wrongfully prosecuted Erikson through nearly a three-trial process lasting over a six (6) year period in a manner that was vengeful and biased evidenced by the dismissal of the third claim and the influence of outside sources. Pawnee County's goals were driven by the OSA and other politicians despite the fact that the state's evidence did not support the continuation of the process.

54. Plaintiff is entitled to relief for the damages he has sustained as a result of the Defendants' actions.

THIRD CLAIM FOR RELIEF
Civil Rights Violation

55. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 54 of his Complaint.

56. Erikson's civil rights guaranteed by the 14th Amendment of the Constitution of the United States were violated by Pawnee County.

57. Plaintiff is entitled to relief for the damages he has sustained as a result of Defendants' actions.

FOURTH CLAIM FOR RELIEF
Civil Conspiracy

58. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 57 of his Complaint.

59. Based upon the allegations contained herein, Harland Stonecipher, the OSA, Pawnee County via Larry Stuart, as well as Mike Turpen and the law firm of Riggs,

Abney, Neal, Turpen, Orbison & Lewis, Inc., civilly conspired to wrongfully prosecute Plaintiff in violation of law causing Plaintiff damages.

60. Plaintiff is entitled to relief for the damages he has sustained as a result of Defendants' actions.

FIFTH CLAIM FOR RELIEF
Intentional Infliction of Emotional Distress

61. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 60 of his Complaint.

62. Defendants' collective actions caused Michael Erikson to experience severe emotional distress.

63. Plaintiff is entitled to relief for the damages he has sustained as a result of Defendants' actions.

SIX CLAIM FOR RELIEF
Punitive Damages

64. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 63 of his Complaint.

65. Defendants' conduct was malicious, and willful and wanton entitling Michael Erikson to relief for the damages caused him.

WHEREFORE premises considered, Erikson requests relief from the Court in an amount to be determined at trial, including but not limited to punitive damages to punish Pawnee County and the related parties for the damages caused to Erikson, including attorney fees and costs and for such further relief at law or equity available to be awarded by the Court.

DATED this 15th day of September, 1999.

Brett D. Sanger, OBA #14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 North Robinson
Oklahoma City, OK 73102
Telephone: (405) 232-1015
Facsimile: (405) 239-7795
AND
William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, Oklahoma 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF

REQUEST FOR A JURY TRIAL

Plaintiff hereby demands a trial by jury.

DATED this 15th day of September, 1999.

Brett D. Sanger, OBA #14850
BRETT D. SANGER, P.C.
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204 North Robinson
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Telephone: (405) 232-1015
Facsimile: (405) 239-7795
AND

William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, Oklahoma 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF

AID TO THE COURT

TO: The Honorable Michael Burrage
United States District Judge
U.S.D.C. Northern District of Oklahoma
333 West 4th Street, Room 411
Tulsa, Oklahoma 74103

COPY TO: All Opposing Counsel

FROM: Brett D. Sanger, OBA #14850
Brett D. Sanger, P.C.
204 N. Robinson, Suite 1500
Oklahoma City, OK 73102
Attorney for Plaintiff, Michael Ed Erikson

DATE: April 8, 2000

RE: Qualified Immunity of Defendant Larry Stuart
Michael Ed Erikson v. Pawnee County, et al.
U.S.D.C. N.D. Oklahoma Case No. 99-CV-0786-BU(M)

I. INTRODUCTION

(Filed April 10, 2000)

The purpose of qualified immunity is to shield a public official in the performance of his *duties* and to prevent frivolous lawsuits against said officials to avoid lengthy legal process which could interfere with the function of the official's duties. Erikson unnecessarily devoted eight (8) years of his life in defending a frivolous prosecution for a crime he did not commit. He should, at the minimu, be entitled to conduct discovery to prove he was conspired against and prosecuted solely for the promotion of the so-called "hunting" rights of coonhunters

and/or the members of the Oklahoma Sportsman's Association ("OSA").

Defendant Larry Stuart ("Stuart") opted to file a Motion to Dismiss rather than assert his defense of qualified immunity in an answer to Plaintiff Michael Erikson's ("Erikson") allegations. The Court should assume that the facts contained in Erikson's Complaint are true and undisputed according to well-established law. The Court should also presume true the facts Erikson believes he can prove through the discovery process. Additionally, Stuart has not denied that Erikson has failed to adequately allege that Stuart is liable for a violation of Erikson's statutory and/or constitutional rights.

When raised in a motion to dismiss, the qualified immunity claim requires a two-part inquiry. First, the Court must determine if the allegations, assumed to be true, are sufficient to state a constitutional or statutory violation. If so, the Court must then ascertain whether a reasonable official in Stuart's position would have known his conduct violated Erikson's rights. Stuart participated in a conspiracy to violate Erikson's right to a fair trial, and discovery will prove Erikson's allegations.

II. FACTS TO BE PROVEN THROUGH DISCOVERY

Plaintiff believes the following facts against Stuart may be proven with the assistance of adequate discovery.

1. In violation of Oklahoma statutes, Stuart solicited (according to media publications) and/or accepted private funds for the prosecution of Erikson.

2. Stuart conspired with, by pre-prosecution contact with, Defendants Harland Stonecipher ("Stonecipher"), Michael Turpen ("Turpen"), and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.'s ("Riggs-Abney") to prosecute Erikson for first degree murder.

3. In violation of tit. 19, O.S. § 215.4, Stuart acted privately and consulted private persons interested in the trial of a criminal case by contact with Turpen, Riggs-Abney, the OSA and Stonecipher.

4. Stuart caused the transfer of Erikson from Payne County to Pawnee County because Payne County would have refused to prosecute Erikson for first degree murder.

5. Stuart attempted to utilize faulty evidence from the scene of the incident, namely by presenting a fifth bullet fragment from the scene, for the purposes of enhancing the charges of first degree murder against Erikson, albeit the absence of a fifth shell casing from the rifle used in the incident.

6. Stuart brought repeated charges against Erikson, when a reasonable prosecutor would have known a conviction would never be obtained, solely for the purpose of obtaining a plea bargain by Erikson for the benefit of the remaining conspirators.

7. Erikson believes evidence exists that Pawnee County District Judges Scott and Revard had prior connections, including business connections, with one of the decedents, Fred Head, which may have caused a biased decision in finding probable cause to prosecute Michael Erikson for first degree murder. Plaintiff believes Stuart

may have utilized such connections to cause a determination of probable cause to continue Erikson's prosecution.

8. Stuart was aware of a juror who committed perjury in the first Erikson trial which ended in an eleven (11) to one (1) vote for acquittal because of the perjurous juror's failure to deliberate. Stuart failed to pursue perjury charges against the juror, thereby denying Erikson a right to a fair trial.

9. Erikson believes additional discovery will reveal evidence of further conspiratorial acts by the Defendants.

III. ARGUMENT AND AUTHORITY

Larry Stuart is not entitled to qualified immunity because he was not performing discretionary functions as a prosecutor when he made the decision to conspire with the remaining Defendants to prosecute Erikson for first degree murder and the related second and near third trials. As a result, his decisions caused Erikson to be tried repeatedly for a crime he did not commit, which violated his right to due process.

Erikson was entitled to due process of the law, as guaranteed by the Fourteenth Amendment of the Constitution. As correctly set forth in Stuart's Motion to Dismiss, the Plaintiff carries the burden of convincing the Court that the law was clearly established, and Plaintiff must meet that burden by doing more than identifying in the abstract a clearly established right and alleging that

the Defendant has violated it.[1] Erikson has identified much more than "abstract" factual allegations which, if nothing more, support circumstantially that a conspiracy to violate Erikson's constitutional rights existed.

The law, which Larry Stuart violated, could not have been more clearly established than Oklahoma statutes.

Tit. 19 O.S. § 215.4 requires

> [a] district attorney is not to act privately, but for the entire people of the state, and it is his duty to be impartial in the discharge of his functions and not to consult any privat4e persons interested in the trial of a criminal case.[2]

Based upon the allegations in Erikson's Complaint, as well as evidence obtained form Pawnee County, Stuart consulted with Turpen and Stonecipher prior to the initiation of any charges against Erikson, which is clearly a violation of Oklahoma statutes. Any reasonable district attorney would have inquired as to the motivation of the third party contact and would have ascertained the biasedness of the contact. Instead, Stuart furthered the biased approach of the contact by soliciting and accepting funds to assist him in Erikson's prosecution and acting in the interests of the third parties.

Stuart was not exercising discretion in the function of his duties. If anything, he was acting as a private attorney for parties interested in the outcome of Erikson's prosecution, namely Turpen, Riggs-Abney and the OSA (of

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1 *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988).

2 *Kelly v. Ferguson*, 115 P. 284 (Okl. Cr. 1911).

which Fred Head and Tony McCullom, the deceased, were members) vis-a-vis Stonecipher.[3]

In *Spurlock v. Satterfield*,[4] the court held that a deputy sheriff was not entitled to absolute and/or qualified immunity for allegations that he wrongfully investigated, prosecuted, convicted and incarcerated the plaintiff and fabricated evidence, manufactured probable cause and conspired with others to maliciously prosecute and convict him.[5]

Conclusion

Erikson respectfully requests this Court allow him to proceed with his right to pursue the violation of his constitutional rights by the Defendants by allowing him to conduct any and all necessary discovery to support his claims against the Defendants.

Respectfully submitted,

/s/ Brett D. Sanger
Brett D. Sanger, OBA No. 14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 N. Robinson
Oklahoma City, OK 73102
Telephone: 405-232-1015
Facsimile: 405-239-7795
And

---

[3] Note that Stonecipher was President of the OSA as well as the majority stockholder of Prepaid Legal, one of, if not, the largest clients of Turpen and/or Riggs-Abney.

[4] *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999).

[5] *See also Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, OK 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF,
MICHAEL ED ERIKSON

CERTIFICATE OF SERVICE

This will certify that on the 8th day of April, 2000, a true and correct copy of the above and foregoing was placed in the U.S. Mail, with sufficient postage affixed thereon, addressed to:

James L. Gibbs, Rachel Jackson
and Chris J. Collins
Collins, Zorn, Jones & Wagner, P.C.
429 NE 50th, Second Floor
Oklahoma City, OK 73105-1815

Douglas A. Wilson, James R. Polan
Riggs, Abney, Neal, Turpen, et al.
502 W. Sixth Street
Tulsa, OK 74119-1010

Ken Rainbolt
Ken Rainbolt, P.C.
P.O. Box 207
Durant, OK 74701-0207

Wellon B. Poe
Assistant Attorney General
4545 N. Lincoln, suite 260
Olahoma City, OK 73105

Billy A. Mickle
P.O. Box 1365
Durant, OK 74702

S.M. Fallis, Jr., Thomas D. Robertson
Trent A. Gudgel
Nichols, Wolfe, Stamper, Nalley, et al.
Suite 400 Old City Hall Building
124 E. Fourth Street
Tulsa, OK 74103-5010

/s/ Brett D. Sanger
Brett D. Sanger

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) MICHAEL ED ERIKSON, Plaintiff, -vs- (1) PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, et al. Defendants.	))))))))))))	Case No. 99-CV-0786-BU(M)

PLAINTIFF'S OBJECTION TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE

(Filed July 5, 2000)

COMES NOW THE PLAINTIFF, Michael Ed Erikson ("Erikson"), and hereby objects to the Report and Recommendation (hereinafter the "Report") filed herein by United States Magistrate Judge Frank H. McCarthy with respect to granting the Defendants', and each of their, Motions to Dismiss and denying Plaintiff's Motion to Join Additional Party Defendant. Erikson's Complaint sets forth factual allegations that, if proven to be true, support causes of action against each and every Defendant in the captioned matter. Erikson's allegations are specific enough to warrant this matter proceed. He is not required to prove the facts alleged but to specify allegations against the Defendants which support a cause of action.

In support of his Objection, Erikson respectfully submits the following:

STANDARD OF REVIEW FOR MOTIONS TO DISMISS

Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should not be granted by this Court unless the Court determines the Plaintiff can prove no set of facts in support of his claims that would entitled [sic] him to relief. *Mauz v. Mountain States Tel. & Tel. Inc.*, 54 F.3d 1988 (10th Cir. 1995). If the court accepts Erikson's factual allegations as true, and indulges all inferences in his favor, then Erikson should be allowed to proceed through the discovery process to support his claims because, if said factual allegations are in fact true, Erikson's civil rights, as guaranteed by the United States Constitution have most certainly been violated.

ERIKSON'S FACTUAL ALLEGATIONS

The pertinent factual allegations contained in Erikson's Complaint, if true, support a cause of action for a civil conspiracy as well as continuing violations of his civil rights pursuant to U.S.C. 28 § 1983, et seq., as well as possible Fourth Amendment violations.

The Report does not address whether all the allegations, if proven true, support the causes of action against the Defendants. Erikson submits the allegations support causes of action against the Defendants, and Erikson should be entitled to conduct discovery to further prove his allegations. There is no harm to the Defendants for

this Court to allow Erikson to conduct discovery to further support his causes of action. If the discovery process proves futile, the Defendants should be dismissed upon dispositive motions. All of the factual allegations contained in Erikson's Complaint smack of impropriety among the Defendants and circumstantially support that a conspiracy existed among the Defendants.

On or about April 10, 2000, at this Court's request, Erikson submitted an Aid to the Court for this Court's review. Included in the Aid to the court were factual allegations which, if proven true, would entitle Erikson to relief in the instant matter. The nine (9) allegations are resubmitted herein as follows:

1. In violation of Oklahoma statutes, Stuart solicited (according to media publications) and/or accepted private funds for the prosecution of Erikson.

2. Stuart conspired with, by pre-prosecution contact with, Defendants Harland stonecipher ("Stonecipher"), Michael Turpen ("Turpen"), and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.'s ("Riggs-Abney") to prosecute Erikson for first degree murder.

3. In violation of tit. 19, O.S. § 215.4, Stuart acted privately and consulted private persons interested in the trial of a criminal case by contact with Turpen, Riggs-Abney, the OSA and Stonecipher.

4. Stuart caused the transfer of Erikson from Payne County to Pawnee County because Payne County likely would have refused to prosecute Erikson for first degree murder.

5. Stuart attempted to utilize faulty evidence from the scene of the incident, namely by presenting a fifth bullet fragment from the scene, for purposes of enhancing charges of first degree murder against Erikson, albeit the absence of a fifth shell casing from the rifle used in the incident.

6. Stuart brought repeated charges against Erikson, when a reasonable prosecutor would have known a conviction would never be obtained, solely for the purpose of obtaining a plea bargain by Erikson for the benefit of the remaining conspirators.

7. Erikson believes evidence exists that Pawnee County District Judges Scott and Revard had prior connections, including business connections, with one of the decedents, Fred Head, which may have caused a biased decision in determining probable cause to prosecute Michael Erikson for first degree murder. Plaintiff believes Stuart may have utilized such connections to cause a determination of probable cause to continue Erikson's prosecution.

8. Stuart was aware of a juror who committed perjury in the first Erikson trial which ended in an eleven (11) to one (1) vote for acquittal because of the perjurous juror's failure to deliberate. Stuart failed to pursue perjury charges against the juror, thereby denying Erikson a right to a fair trial.

9. Erikson believes additional discovery will reveal evidence of further conspiratorial acts by the Defendants.

Additionally, Erikson has indicated that evidence at the scene of the incident may have been tampered with

by law enforcement officials and then utilized for purposes of establishing probable cause against him. If Erikson has not made that allegation as clear as he should for consideration by the Court, he will gladly amend his Complaint to assert the allegation more clearly.

Erikson should be entitled to conduct discovery to support any additional causes of action revealed during the discovery process. If false testimony and/or tampered evidence were presented for purposes of establishing probable cause to repeatedly prosecute Erikson, he should be entitled to proceed with this litigation.

The applicable paragraphs of Erikson's Complaint which, if true, support his causes of action are as follows:

Paragraph 27 of the Complaint, alleges that Pawnee County may have lacked jurisdiction to prosecute Erikson at all:

> 27. After three (3) days of confinement in the Payne County Jail, Erikson was transported to Pawnee County. Upon leaving the Payne County Jail, Erikson was advised that charges would likely not be filed. Upon arriving in Pawnee County, however, Erikson was advised that two (2) counts of first degree murder would be filed. Although both affidavits of probable cause indicate the incident took place in Payne County and despite the fact that no charges had been filed, Erikson continued to be held without a bond in the custody of the Pawnee County Sheriff.

Paragraphs 28 through 47, inclusive, circumstantially support that the Defendants collectively engaged in a conspiracy to cause Erikson's prosecution. Irrespective of

whether probable cause was determined at Erikson's preliminary hearing, if in fact Defendants conspired to cause Erikson's prosecution, his civil rights were violated.

PAWNEE COUNTY'S MOTION TO DISMISS

Erikson's allegation that Pawnee County may have had some involvement with private funds used to assist in his prosecution, if true, would include Pawnee in the conspiracy to wrongfully prosecute Erikson. If not for the efforts of third parties and private individuals, Erikson alleges he would have never been prosecuted for murder. It is remarkable that any private citizen could be subjected to the whims of non-governmental parties and placed on trial for his life on repeated occasions.

If Pawnee accepted and utilized the private funds, it too violated Erikson's constitutional rights. Erikson is not required to prove the allegation to survive Pawnee County's Motion to Dismiss.

The "specific" factual allegation against Pawnee County is that it assisted in the utilization of private funds. Pawnee County is not going to voluntarily disclose how it utilized the funds absent formal discovery. Eriksons' allegations against Pawnee County are specific enough to survive a Motion to Dismiss.

LARRY STUART'S MOTION TO DISMISS and PLAINTIFF'S MOTION TO JOIN ADDITIONAL PARTY DEFENDANT

Erikson has briefed, in detail, the reasons Larry Stuart is not absolutely immune from liability as a prosecutor when he is acting outside his prosecutorial role. If Erikson's allegations against Larry Stuart are true, he *has* acted outside his role as a prosecutor and is not entitled to absolute immunity. Larry Stuart, in his individual capacity, should be added as an additional party defendant and declaratory relief should be rendered whether he was acting outside his role as a prosecutor after further discovery is conducted. If evidence at the scene of the incident was tampered with and false testimony presented to the Court, Erikson was denied a right to a fair and impartial trial and he should be allowed to proceed.

MOTIONS TO DISMISS OF HARLAND STONECIPHER, OKLAHOMA SPORTSMAN'S ASSOCIATION, MICHAEL TURPEN AND RIGGS, ABNEY, NEAL, TURPEN ORBISON & LEWIS, INC.

Erikson has identified the referenced Defendants entered into a civil conspiracy to violate his civil rights. Once their conspiratorial conduct was set into motion prior to the time Erikson was charged with a crime, Erikson was denied the right to a fair and impartial trial. Defendants' conduct and illegal contributions prior to Erikson being formally charged cannot be severed by the fact their conspiracy resulted in probable cause being determined to proceed with their goal. The parties were not acting as private attorneys in a criminal trial. They utilized their conspiratorial acts to cause Erikson to be prosecuted, not to assist in a normal prosecution. As a

result of their continuing efforts, Erikson was tried almost three (3) times for crimes for which he had a clear defense. Erikson has alleged facts which support Defendants' conduct violated due process of the law and he should be allowed to continue this matter to further support his claims.

CONCLUSION

THE Defendants' Motions to Dismiss should be denied. Erikson's Complaint specifies factual allegations that, if proven true, support causes of action against the Defendants. The discovery process will prove Erikson's Constitutional rights were violated by the Defendants and he should not, yet again, be denied due process of the law.

WHEREFORE, premises considered, Erikson hereby requests this Court deny the Defendants' Motions to Dismiss and grant Erikson's Motion to Add Additional Party Defendant because he has alleged factual allegations that, if true, indicate his rights have been violated.

Respectfully submitted,

/s/ Brett D. Sanger
Brett D. Sanger, OBA No. 14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 North Robinson
Oklahoma City, OK 73102
Telephone: 405-232-1015
Facsimile: 405-239-7795
And

William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, OK 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF,
MICHAEL ED ERIKSON

CERTIFICATE OF SERVICE

This will certify that on the 3rd day of April, 2000, a true and correct copy of the above and foregoing was placed in the U.S. Mail, with sufficient postage affixed thereon, addressed to:

James L. Gibbs, Chris J. Collins
Rachal Jackson, Robert Applegate
Collins, Zorn, Jones & Wagner, P.C.
429 NE 50th, Second Floor
Oklahoma City, OK 73105-1815
(524-2078)

Douglas A. Wilson, James R. Polan
Riggs, Abney, Neal, Turpen, et al.
502 W. Sixth Street
Tulsa, OK 74119-1010
(918-587-2150)

Ken Rainbolt (580-924-1154)
Ken Rainbolt, P.C.
P.O. Box 207
Durant, OK 74701-0207
(580) 924-1151

Wellon B. Poe (528-1867)
Assistant Attorney General
4545 N. Lincoln, suite 260
Olahoma City, OK 73105

Billy A. Mickle (580-924-2600)
P.O. Box 1365
Durant, OK 74702

S.M. Fallis, Jr., Thomas D. Robertson
Trent A. Gudgel
Nichols, Wolfe, Stamper, Nalley, et al.
Suite 400 Old City Hall Building
124 E. Fourth Street
Tulsa, OK 74103-5010
(918-582-9321)

/s/ Brett D. Sanger
Brett D. Sanger

No. 01-1099

Supreme Court, U.S.
FILED
FEB 27 2002

In The

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY; LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties; HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION; MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.; RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT PAWNEE COUNTY'S BRIEF IN OPPOSITION

JAMES L. GIBBS, II,
OK No. 15689
Counsel of Record
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

ROBERT E. APPLEGATE,
OK No. 17376
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

Attorneys for Respondent Pawnee County, an Oklahoma political subdivision, ex rel. Board of County Commissioners of Pawnee County

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Michael Erikson (Plaintiff in the underlying lawsuit, hereinafter "Petitioner") presents two questions for the Court's review. First, Petitioner asks whether the dismissal of his cause of action violates his rights pursuant to the Due Process Clause of the Fifth Amendment and is contrary to the Court's decision in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). Second, Petitioner asks whether a district court may dismiss a civil rights complaint without granting leave to amend.

LIST OF PARTIES

As Petitioner has failed to suggest otherwise, the caption of this case apparently identifies the names of the parties to this proceeding. However, the Respondent Pawnee County (hereinafter "Respondent County") contends that it is not a party to this proceeding.

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OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

Petitioner's request for review in this matter concerns the decision of the United States Court of Appeals for the Tenth Circuit in *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). Petitioner's original cause of action was dismissed by the United States District Court for the Northern District of Oklahoma on August 21, 2000, in *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M), and was not reported.

STATEMENT OF JURISDICTION

Petitioner has asserted jurisdiction in this proceeding pursuant to 28 U.S.C. § 1254. Petitioner originally brought his cause of action against the Respondent County and others pursuant to 28 U.S.C. §§ 1331, 1343 and 1367 based upon alleged violations of his constitutional rights and state tort claims.

As described fully herein, the Respondent County asserts that jurisdiction is not proper with respect to any claims advanced against it by Petitioner in the underlying lawsuit. Specifically, Petitioner has failed to object to, let alone appeal, any decision by the District Court concerning the dismissal of the Respondent County.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

As asserted in the Petition for Writ of Certiorari, Petitioner's cause of action is premised upon alleged violations of his constitutional rights and state tort claims. Additionally, Petitioner suggests that the dismissal of his cause of action violates his due process rights pursuant to the Fifth Amendment. However, the present proceeding solely concerns whether the District Court properly dismissed Petitioner's lawsuit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Petitioner originally brought his cause of action against the Respondent County and other Defendants alleging that he was wrongfully charged and tried for the murder of two individuals. Specifically, Petitioner presented claims for malicious prosecution, malicious abuse of process, a violation of his Fourteenth Amendment constitutional rights, civil conspiracy, intentional infliction of emotional distress and punitive damages. (See

Petitioner's Petition for Writ of Certiorari, Appendix, pp. 34a-36a).

As described in United States Magistrate Judge Frank H. McCarthy's Report and Recommendation, Petitioner contends that on June 26, 1992, he shot and killed Fred Head, Jr. ("Head") and Tony McCollum ("McCollum") in self defense. (Petitioner's Petition for Writ of Certiorari, Appendix, pp. 14a-15a). Petitioner alleges that he was wrongfully charged with the murders of Head and McCollum as a result of pressure from Defendants not including the Respondent County. Petitioner complains that Defendant Oklahoma Sportman's Association raised funds to assist in his prosecution and certain monies were given to Defendant Michael Turpen, a private attorney, to assist in and ultimately conduct the prosecution.

In the Complaint, with respect to the Respondent County, Petitioner proposed that "Pawnee County officials," specifically, the Pawnee County District Attorney, Larry Stuart ("Stuart"), maliciously prosecuted him. (Petitioner's Petition for Writ of Certiorari, Appendix, p. 34a). In fact, throughout the Complaint, Petitioner interchanges "Pawnee County" for Stuart and the District Attorney's Office. Outside of his generic reference to Pawnee County in this regard, Petitioner presented no allegations concerning conduct of the Respondent County independent of the acts alleged on behalf of Stuart and the District Attorney's Office.

As a result, the Respondent County presented a Motion to Dismiss contending that it cannot be held liable for any actions of Stuart or the District Attorney's Office. While Petitioner concedes this fact, he complains that

someone contributed money to his prosecution and that *someone* could very well have been the Respondent County. (See Petitioner's Petition for Writ of Certiorari, Appendix, p. 52a). In his Report and Recommendation, Magistrate Judge McCarthy recommended the dismissal of Pawnee County pursuant to the authority advanced by the Respondent County, and conceded by Petitioner, and further determined that Petitioner's "vague allegations unsupported by any specific factual assertions against Pawnee County" were insufficient. (See Petitioner's Petition for Writ of Certiorari Appendix, p. 16a).

Petitioner appealed the dismissal of his cause of action to the United States Court of Appeals for the Tenth Circuit. In his Brief in Chief, Petitioner presented two issues: (1) whether the District Court properly found that Petitioner's factual allegations were insufficient pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and (2) whether the District Court erred in not granting leave for Petitioner to amend his Complaint to include Stuart in his individual capacity. Petitioner failed to present any objection to or issue for the Court of Appeals regarding the dismissal of the Respondent County. (See generally Petitioner's Petition for Writ of Certiorari, Appendix, pp. 1a-8a).

ARGUMENT AND AUTHORITY

On December 28, 1999, the Respondent County moved to dismiss Petitioner's claim against it based upon the fact that Petitioner's cause of action against the Respondent County concerns alleged actions of the

Pawnee County District Attorney. In Oklahoma, it is well settled that a district attorney is an arm of the state and, as such, the county cannot be held liable for the district attorney's alleged improper actions. *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). In *Laidley*, the Court stated:

> The duties of the District Attorney are set forth generally in Oklahoma Statute Annotated Title 19, § 215.4 and are implemented by other state statutes. A District Attorney is to prosecute all actions for crime in his district and prosecute or defend civil actions in which any county in his district is interested. *Id.* The District Attorney's counsel, a state agency, pays all salaries and expenses of the office of District Attorney, including salary of the District Attorney, from state treasurery funds. *Id.* at § 215.28. All employees of the District Attorney serve at the pleasure of the District Attorney and are deemed to be state employees for all purposes. Id. at §§ 215.30 and 215.31.

Laidley at 1391. *See also Arnold v. McClain*, 926 F.2d 963, 965-966 (10th Cir. 1991).

In response to the Respondent County's Motion to Dismiss, Petitioner conceded that the Respondent County cannot be held liable for acts of the District Attorney. However, Petitioner suggested that his prosecution was funded by an unknown third party which *could have been* the Respondent County. In recommending that the Respondent County's Motion to Dismiss be granted, United States Magistrate Judge Frank H. McCarthy recognized that Petitioner's vague and unsupported allegations were not sufficient to withstand the Respondent

County's Motion to Dismiss. (See Petitioner's Petition for Writ of Certiorari, Appendix, p. 16a).

In his Brief in Chief to the Tenth Circuit, Petitioner abandoned his claim against the Respondent County or otherwise failed to properly appeal its dismissal. Rather, Petitioner spoke solely of the alleged actions of the District Attorney. In fact, outside of his generic references to the District Attorney as "Pawnee County," Petitioner presented no arguments concerning the Respondent County as the phantom third-party fundraiser for his prosecution. Accordingly, no such issue was addressed by the Tenth Circuit. (See Petitioner's Petition for Writ of Certiorari, Appendix, pp. 1a-8a).

The issues submitted to the Court in this proceeding similarly reflect Petitioner's abandonment of any objection to or appeal of the District Court's dismissal of the Respondent County. Rather, in his Petition for Writ of Certiorari, Petitioner only generally asserts that the District Court and Court of Appeals was incorrect in finding that his allegations were insufficient. In the Petition for Writ of Certiorari, Petitioner specifically provides:

> The adequacy of the Complaint concerns two *specific* allegations: **the claim that the *private defendants* motivated or controlled the prosecution; and the claim that officials lacked probable cause to pursue the *prosecution*.**

(Petitioner's Petition for Writ of Certiorari, p. 17) (Emphasis added). Moreover, the "two alleged pleading defects" referenced by Petitioner with respect to the second question for the Court's review do not concern any

allegations against the Respondent County. (See Petitioner's Petition for Writ of Certiorari, p. 20).

In any event, whether the Respondent County can be held liable, or more accurately, *potentially* liable, is beyond dispute pursuant to *Laidley* and *Arnold*. Petitioner has named the Respondent County as a Defendant solely for the conduct and actions of District Attorney Larry Stuart in his official capacity as District Attorney for Osage and Pawnee Counties. Petitioner has not asserted any claims against the Respondent County independent of the actions of the District Attorney. Accordingly, even assuming, *arguendo*, Petitioner has properly included the Respondent County in this proceeding, the District Court's dismissal of the Respondent County was nevertheless proper.

CONCLUSION

Petitioner has clearly failed to properly preserve any objection to the District Court's dismissal of the Respondent County. As discussed, Petitioner's Petition for Writ of Certiorari, as well as appeal to the Court of Appeals, is void of any argument or authority concerning the dismissal of the Respondent County. Rather, Petitioner has presented only two questions for the Court, neither of which concern whether the Respondent County can be held liable for acts of the District Attorney or whether Petitioner presented sufficient facts in support of his post-Complaint allegation that *someone, maybe the Respondent County,* contributed funds to his prosecution.

Accordingly, with respect to the Respondent County, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES L. GIBBS, II,
OK No. 15689
Counsel of Record
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

Attorneys for Respondent Pawnee County, an Oklahoma political subdivision, ex rel. Board of County Commissioners of Pawnee County

ROBERT E. APPLEGATE,
OK No. 17376
COLLINS, ZORN, WAGNER & GIBBS, P.C.
429 N.E. 50th Street,
Second Floor
Oklahoma City, Oklahoma
73105
Telephone: (405) 524-2070
Facsimile: (405) 524-2078

Attorneys for Respondent Pawnee County, an Oklahoma political subdivision, ex rel. Board of County Commissioners of Pawnee County

(3)

No. 01-1099

IN THE

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, *ex rel.* BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties, HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION, MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MICHAEL TURPEN and RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC.

S.M. FALLIS, JR.
NICHOLS, WOLFE, STAMPER, NALLY, FALLIS & ROBERTSON, INC.
124 East Fourth Street
Suite 400
Tulsa, OK 74103
(918) 584-5182

DOUGLAS A. WILSON
Counsel of Record
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119-1010
(918) 587-3161

Attorneys for Respondents Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.

172628

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly affirmed the District Court's 12(b)(6) dismissal of Plaintiff's § 1983 Civil Rights Complaint on the following grounds and for the following reasons:

   (a) Pawnee County is not liable for the acts of its district attorney because in Oklahoma a district attorney is an arm of the state, not the county;

   (b) As such, a district attorney is a state actor entitled to Eleventh Amendment immunity;

   (c) The district attorney enjoys absolute prosecutorial immunity;

   (d) Although Petitioner argued that the district attorney's acceptance of the help offered him by privately-funded research assistants and investigators violated a state statute, namely, Okla. Stat. tit. 19, § 215.4, there was no showing that it violated a clearly established federal right secured to Petitioner by the United States Constitution; accordingly, the district attorney is entitled to qualified immunity;

   (e) The private defendants' funding, and arranging for, research assistants and investigators to assist in the state's analysis of a double homicide, in and of itself did not violate Petitioner's civil rights;

(f) The doctrine of issue preclusion required the federal court to find probable cause for the arrest and prosecution of Petitioner because the state court twice found probable cause sufficient to bind plaintiff over for trial;

(g) A federal due process violation does not occur simply because private monies are used to hire research assistants and investigators to help the state in its investigation of a double homicide;

(h) A Fourth Amendment claim for malicious prosecution under § 1983 cannot be maintained absent factual allegations indicating a lack of probable cause for arrest and prosecution; and

(i) General allegations unconnected to a specific defendant and/or which do not implicate a federal right secured by the United States Constitution will not support a § 1983 claim.

2. Whether the Court of Appeals correctly affirmed the District Court's 12(b)(6) dismissal of Plaintiff's § 1983 Civil Rights Complaint in light of the fact that Plaintiff's proposed amendment to the Complaint did not change any of the substantive allegations.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., is a professional corporation, and no parent company and no publicly held company owns 10% or more of its stock.

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STATUTE INVOLVED

Title 19, Oklahoma Statutes, Section 215.4

> The district attorney, assistant district attorneys, or special assistant district attorneys authorized by subsection C of Section 215.37M of this title, shall appear in all trial courts and prosecute all actions for crime committed in the district, whether the venue is changed or not; the district attorney or assistant district attorneys shall prosecute or defend in all courts, state and federal, in any county in this state, all civil actions or proceedings in which any county in the district is interested, or a party unless representation for the county is provided pursuant to subsection A of Section 215.37M of this title; and the district attorney or assistant district attorneys shall assist the grand jury, if required, pursuant to Section 215.13 of this title. The district attorney may at all times request the assistance of district attorneys, assistant district attorneys or district attorney investigators from other districts who then may appear and assist in the prosecution of actions for crime or assist in investigation of crime in like manner as assistants or investigators in the district.

STATEMENT OF THE CASE

1. Petitioner's Complaint

Petitioner alleged that on the evening of June 26, 1992, he went out to keep watch over his family's rural acreage in Pawnee County, Oklahoma. (Complaint, ¶¶ 11, 12 and 13).

Petitioner thereupon encountered Tony McCollum ("McCollum") and Fred Head ("Head"), two men whom Petitioner believed were avid racoon hunters with no respect for landowners' rights. (Complaint, ¶¶ 13, 17 and 18). Petitioner shot and killed the two men. (Complaint, ¶ 10.a).

Petitioner was the only one to survive this encounter. (Complaint, ¶¶ 13, 14, 23, 24, 25 and 26). Later that evening, Petitioner would reenact the events for police, voluntarily give the police a written statement and undergo several hours of interrogation. (Complaint, ¶¶ 25 and 26).

Petitioner was subsequently charged with two counts of first-degree murder and bound over for trial. (Complaint, ¶¶ 30 and 33). A Pawnee County jury acquitted Petitioner on charges of murder and/or voluntary manslaughter of Head. (Complaint, ¶¶ 10.c and 36). After the same jury failed to reach a unanimous decision regarding Petitioner's killing of McCollum, the State amended the charges against Petitioner and retried him for voluntary manslaughter.[1] (Complaint,

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1. Petitioner's Complaint inadvertently says that Petitioner was tried a second time for first degree murder. All parties stipulated in the First Amended Joint Case Management Plan to the following facts: (1) On the evening of **June 26, 1992**, Petitioner encountered Tony McCollum and Fred Head. (2) Petitioner shot and killed both Head and McCollum. (3) Petitioner was prosecuted for the first degree murder of both Head and McCollum. Petitioner asked for and received instructions on voluntary manslaughter and self-defense. (4) On **September 18, 1993**, a Pawnee County jury acquitted Petitioner of the murder and voluntary manslaughter of Fred Head. The same jury failed to reach a unanimous decision regarding Petitioner's killing of McCollum. The court declared a mistrial. (5) The State of Oklahoma amended the charges against Petitioner and retried him for the voluntary manslaughter of

(Cont'd)

¶¶ 36 and 37). A Pawnee County jury once again failed to reach a unanimous decision and another mistrial was declared. (Complaint, ¶ 39). A third prosecution for the voluntary manslaughter of McCollum was dismissed without prejudice. (Complaint, ¶¶ 34, 35 and 39).

Petitioner complains that privately-funded research assistants and investigators helped the state research and investigate the double homicide and that the Respondents funded, arranged for, or accepted, such private assistance in violation of Petitioner's civil rights. (Complaint, ¶¶ 31 and 32).

2. Rule (12)(b)(6) Motions to Dismiss Petitioner's Complaint

All six Respondents filed Motions to Dismiss Petitioner's Complaint. Respondent Pawnee County, ex rel. Board of County Commissioners ("Pawnee County" or "County"), argued that an Oklahoma county is not responsible for the acts or omissions of the State's District Attorney. Respondent Larry Stuart ("the State's District Attorney" or "Stuart") was sued solely in his official capacity as District Attorney of Osage and Pawnee Counties. Stuart argued that Petitioner's Complaint against him was barred by the Eleventh Amendment. He also argued that Petitioner's claims were predicated solely on his prosecution for murder and/or voluntary manslaughter, and as such, were barred by either

(Cont'd)

McCollum.On **January 26, 1996,** a Pawnee County jury once again failed to reach a unanimous decision and a mistrial was declared. (6) On **September 18, 1998,** a third prosecution for the voluntary manslaughter of McCollum was dismissed without prejudice. (First Amended Case Management Plan, pages 3-4).

absolute prosecutorial immunity or by the doctrine of qualified immunity.

Respondents Harland Stonecipher ("Stonecipher"), the Oklahoma Sportsman's Association ("Sportsman's Association"), Michael Turpen ("Turpen") and the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. ("RANTOL"), (collectively, "the private Respondents"), argued that Petitioner's claims were defective on numerous grounds, each of which was fatal to Petitioner's action against Respondents.

3. Petitioner's Motion to Amend His Complaint

Petitioner responded with briefs in opposition to Respondents' motions to dismiss and also filed a motion to amend his Complaint to join the State's District Attorney, Stuart, "in his individual capacity," as an additional party defendant. Despite the passage of nine months, Petitioner never moved the court for leave to amend the substantive allegations of his Complaint.

4. The Magistrate's Report and Recommendation Approved and Adopted by the District Court

In the face of Pawnee County's Motion to Dismiss, Petitioner conceded that the County was not liable for the acts of its district attorney. Without facts that the County took action against him, Petitioner could do little more than rely on vague and unsupported allegations against the County. In the face of Stuart's claims to Eleventh Amendment immunity and absolute prosecutorial immunity, and if added as a defendant in his individual capacity, his claim to qualified immunity, Petitioner argued that Stuart's actions violated

Okla. Stat. tit. 19, § 215.4, but he was unable to show that Stuart's use of privately-funded research assistants and investigators violated a clearly established federal right secured to Petitioner by the United States Constitution. Stuart was therefore entitled to qualified immunity.

The magistrate judge held the Eleventh Amendment barred Petitioner's action against Stuart in his official capacity. He also found that the activities of which Petitioner complained were "undertaken [by Stuart] specifically for the purpose of prosecuting [Petitioner]." Accordingly, he held such activities absolutely privileged as coming within the ambit of initiating, pursuing and presenting the state's case in a criminal prosecution.

The magistrate judge further held that Petitioner's motion to join Stuart "in his individual capacity" would be futile; the amended Complaint would be defeated by either absolute prosecutorial immunity or qualified immunity whether Stuart was named in his official *or* personal capacities.

Petitioner's § 1983 claim against the private Respondents was premised on their alleged conspiracy with the County and Stuart to solicit and accept private monies to help the state research and investigate the double homicide. Petitioner could not identify, however, a federal constitutional or statutory right violated by Respondents' alleged conduct. Nor could Petitioner establish the common law elements of malicious prosecution. The doctrine of "issue preclusion" required the magistrate judge to find probable cause for Petitioner's arrest and prosecution because the state court twice found probable cause sufficient to bind plaintiff over for trial. Because Petitioner's proposed Amended Complaint would not cure these fatal deficiencies, the Complaint was dismissed with prejudice.

Following a *de novo* review of the record, the District Court adopted and affirmed the Magistrate's Report and Recommendation and granted each of the Respondents' respective Motions to Dismiss and denied Petitioner's Motion to Join Additional Party Respondent. Petitioner appealed.

5. The Tenth Circuit Court of Appeals' Decision

Following a *de novo* review of the record, the Tenth Circuit Court of Appeals "agree[d] with the magistrate judge's analysis,"and in addition to those reasons set forth in the Magistrate's Report and Recommendation, articulated three more reasons why the Complaint merited dismissal. First, a federal due process violation does not occur simply because private monies are used to hire research assistants and investigators to help the state investigate a double homicide. Second, a Fourth Amendment claim for malicious prosecution under § 1983 could not be maintained by the Petitioner absent factual allegations indicating a lack of probable cause for his arrest and prosecution. And finally, general allegations unconnected to a specific defendant[2]

2. For example, Petitioner makes one or two extraneous allegations in his Complaint about unnamed individuals who attended Petitioner's trial and are alleged by him to be members of the Sportsman's Association; the alleged disruptive acts of these anonymous and faceless people cannot be attributed to any of the Respondents. Petitioner also complains that the trial judge responded in disgust to his request – made six years after he was acquitted for the first degree murder and/or voluntary manslaughter of Head – to have the bullet fragments removed from Head's body and returned to him. Petitioner characterized the judge's comments as being warrantless and showing "the bias and vengeance that *Pawnee County representatives* unnecessarily harbor toward Erikson." (Complaint, ¶ 10). At another place in his Complaint, he alleges that the Sportsman's Association "*and other unknown sources*" urged Pawnee County to relentlessly pursue a second trial for the McCollum homicide after the first trial ended with a hung jury. (Complaint, ¶ 40).

and/or which do not implicate a federal right secured by the United States Constitution will not support a § 1983 claim.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS FOR WHICH PETITIONER SEEKS REVIEW ARE NOT PRESENTED IN THIS CASE

As an initial matter, this Court should deny review because the "Questions Presented," for which petitioner seeks review, are simply not presented by this case.

In Question One, petitioner attacks the dismissal of his Complaint for lacking specificity of the kind dealt with in this Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). *Crawford-El* required specific allegations that the public official defendant acted with wrongful motive. *Id.* at 597-98. This question is simply not presented.

Of the nine grounds given by the courts below for dismissing Petitioner's Complaint (these nine reasons are set forth underneath Question One in this Brief in Opposition at pages i and ii), none of them suggest that Petitioner's Complaint should be dismissed based on insufficient wrongful motive allegations against the defendant Stuart. Many of the reasons given by the three reviewing courts, not the least of which is that Petitioner failed to allege a federal constitutional violation, are sufficient in and of themselves to warrant dismissal.

II. PETITIONER'S REQUEST FOR A FOURTH DE NOVO REVIEW OF THE RECORD IS A MISUSE OF JUDICIAL RESOURCES

After a complete review of the record in this case, the magistrate judge entered a well-reasoned nine-page Report and Recommendation. Petitioner filed his objection thereto. After conducting a *de novo* review, the district court affirmed the Magistrate's Report and Recommendation. Petitioner appealed. On appeal, the Tenth Circuit Court of Appeals conducted another *de novo* review. The Court of Appeals "agree[d] with the magistrate judge's analysis,"and articulated three additional reasons why the Complaint merited dismissal.

Petitioner's case is insubstantial. His belief that he would have never been prosecuted but for the interest shown by the Oklahoma Sportsman's Association is ludicrous. As told by the Petitioner himself, both in his written statement to the police and in his testimony at trial, on the night of the homicides Petitioner exited his truck with a loaded rifle in hand to confront Tony McCollum. Tony held only a flashlight. As the two men exchanged words, Petitioner lost his temper. They were then joined by Fred Head, a friend of Tony's. Head got out of his vehicle and a scuffle ensued. Head reached for Petitioner's rifle and was shot. He dropped to the ground. Except for a dog leash, Head was unarmed. Petitioner turned to fire a shot at the non-combative and unarmed McCollum. Petitioner shot McCollum in the back and killed him. Petitioner returned to where Head lay on the ground and found him moving his arm. Petitioner then shot Head at close range and killed him. Petitioner was the only surviving witness. He said that Head hit him with the dog chain and that his actions were therefore justified under the doctrine of self-defense. That was the question for the jury.

III. PETITIONER MOVED TO AMEND HIS COMPLAINT TO ADD LARRY STUART IN HIS INDIVIDUAL CAPACITY; IN NINE MONTHS, HOWEVER, HE NEVER MOVED THE COURT FOR LEAVE TO AMEND ANY OF THE SUBSTANTIVE ALLEGATIONS IN HIS COMPLAINT

Petitioner moved to amend his Complaint and the magistrate judge took this into consideration in his Report and Recommendation:

> Plaintiff requests that Larry Stuart, individually, be joined as a defendant in this case. In his official capacity Defendant Larry Stuart has lodged an objection, arguing that such an addition would be futile because, even in his individual capacity, Larry Stuart would be entitled to absolute prosecutorial immunity and qualified immunity.
>
> * * *
>
> . . . The undersigned RECOMMENDS that Plaintiff's Motion to Join Additional Party Defendant be DENIED as Plaintiff would be unable to state a claim upon which relief may be granted against Larry Stuart in his individual capacity.

See Magistrate's Report and Recommendation, pages 5-7.

Despite the passage of nine months, Petitioner never moved the court for leave to amend the substantive allegations of his Complaint.[3]

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3. At the Case Management Conference, the district court, *sua sponte*, did offer Petitioner the opportunity to provide the court with (Cont'd)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

S.M. FALLIS, JR.
NICHOLS, WOLFE, STAMPER,
NALLY, FALLIS & ROBERTSON, INC.
124 East Fourth Street
Suite 400
Tulsa, OK 74103
(918) 584-5182

DOUGLAS A. WILSON
Counsel of Record
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119-1010
(918) 587-3161

Attorneys for Respondents
Michael Turpen and Riggs, Abney, Neal,
Turpen, Orbison & Lewis, Inc.

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a "Factual Statement of the Case." Petitioner took this opportunity to file an "Aid the Court," but this document was insufficient to cure the fatal deficiencies in Petitioners' complaint.